PhD-FDEF-2018-09
The Faculty of Law, Economics and Finance

DISSERTATION

Defence held on 11/09/2018 in Luxembourg

Degree obtained

DOCTEUR DE L'UNIVERSITÉ DU LUXEMBOURG EN DROIT

by

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THE NEW GENERATION OF BILATERAL FREE TRADE AGREEMENTS

A NEW LEGAL INSTRUMENT OF THE UNION'S EXTERNAL ACTION

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List of Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
AG	Advocate General
ARIO	Articles on Responsibility of International Organizations
BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
DG Trade	Directorate General for Trade of the European Commission
EAEC	European Atomic Energy Community
ECHR	European Convention on Human Rights
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EFTAct	European Free Trade Association Court
EPA	EU-Japan Economic Partnership Agreement
EPCt	European Patent Court
EU	European Union
EUSFTA	EU-Singapore Free Trade Agreement
EVFTA	EU-Vietnam FTA
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IIL	International Investment Law
IIA	International Investment Agreement
ILC	International Law Commission
ILO	International Labour Organisation
ITLOS	International Tribunal for the Law of the Sea
ISDS	Investor-State Dispute Settlement
KOREU	EU-Korea Free Trade Agreement
MFN	Most-Favoured-Nation
MIGA	Multilateral Investment Guarantee Agency
NGFTA	New Generation Free Trade Agreement
NTB	Non-Tariff Barrier
OECD	Organisation for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PTA	Preferential Trade Agreement
TEU	Treaty of the European Union
TBT	Technical Barriers to Trade
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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CHAPTER I
INTRODUCTION

The European Union's (EU's) external competence has continuously developed to adapt to internal and international challenges. Since the Lisbon Treaty, the EU allows for a more comprehensive approach toward international trade and investment issues.[1] The New Generation Free Trade Agreements (NGFTAs) are developed to pursue the switch in the EU's external trade policy toward its objectives, as an international actor, aiming to achieve liberalisation of trade and investment.

This introductory chapter sets out the structure of the thesis by providing a more detailed description of the changes in trade policy that led up, to and define the NGFTAs as EU's external trade instruments (Section I-1). The scope of the agreements is also introduced and defined (Section I-2). The subject is thereafter considered through a theoretical foundation in order to provide the context through which the thesis is constructed (Section I-3 and Section I-4). The disposition (Section I-5) stipulates the essential features of the chapters.[2]

1 EU External Trade Policy that Generated NGFTAs

The NGFTAs represent a new advancement that creates opportunities for growth and further development, but it may well erode old certainties and raise new fears.[3] As history has shown, the EU's external competence has undergone changes, and it is still developing to adapt to internal and international challenges. In fact, the formation of the EU's internal market led to a high demand for a common external trade policy beyond trade in goods.[4]

The trend, shown in recent years, puts more focus towards liberalisation of international economic regulations, as expressed by the formation of WTO, and demands further globalisation for the EU's trade policy that covers other fields of economic activities.[5] The trend towards liberalisation demands a higher responsibility on the trade policy since it now covers

[1] From an institutional perspective, the Lisbon Treaty also strengthened the role of the European Parliament in relation to trade related matters. The institutional perspectives will be further discussed in Chapter II.

[2] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018) [2018] N.Y.P.

[3] European Commission External Trade 'Global Europe Competing in the World' 2006 <http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf> accessed 4 November 2015, p. 3.

[4] Angelos Dimopoulos, 'The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations' (2008) 4 Croatian Yearbook of European Law & Policy 101, p. 102.

[5] Ibid., p. 102.

other fields of economic activities.[6] The EU's external competence is still developing, in order to adapt to internal and international challenges.[7]

After the Lisbon Treaty, the scope of the EU's exclusive competence widened into new areas, where areas previously considered within shared competence were included in the Common Commercial Policy (CCP). The CCP now covers the '(...) conclusion of tariff and trade agreements relating to trade in goods and services and the commercial aspects of intellectual property and foreign direct investment.'[8] Foreign Direct Investment (FDI) was, however not clearly defined within the CCP, which has led to many discussions.[9]

1.1 NGFTA as an Abbreviation

The policy changes generated the 'New Generation' of FTAs, which are also known as the 'FTA-plus', 'New Wave', or 'Mega Regional' trade agreements. The former classifications are merely made from either political or through economic analysis. The NGFTAs are used as a terminology, based on the FTA-plus classification through a legal analysis of the content providing a more precise legal definition.

These bilateral international agreements pave the way for a much larger international legal regime, which requires further integration, where the EU, as an actor in international law, needs to better accommodate the interaction between the different regimes.[10] This is because they go beyond the simple elimination of import tariffs and other trade barriers by also addressing non-trade related measures. Using an all-encompassing abbreviation like 'NGFTA' clearly marks the importance of the policy change, leading to such wide scope in the new FTAs.

1.2 Agreements Considered under the New EU's Trade Policy

International trade has been characterized by globalization and liberalisation during the past decades. Currently, the EU has around thirty FTAs in force,[11] or under ratification and on-

[6] European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Global Europe - Competing in the world - A contribution to the EU's Growth and Jobs Strategy, (Communication Global Europe - Competing in the world)' COM (2006) 567 final, p. 18.

[7] Dimopoulos, 'The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations' (n 4), p. 102.

[8] Article 207(1) TFEU.

[9] Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy' (2010) 21 European Journal of International Law 1049, p. 1058, The concept of the FDI will be more clearly defined in the discussions in chapter III.

[10] European Commision 'Trade for All - Towards a More Responsible Trade and Investment Policy' 2014 <https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> accessed 17 May 2018, p. 29.

[11] European Commission 'Overview of FTA and Other Trade Negotiations' 2017 <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf> accessed 27 March 2017.

going negotiations.[12] International and regional trade is increasingly becoming a more focused field.

The EU has been involved in different kinds of commercially driven FTAs. The general rule can be that the EU FTA policy should require both a clear economic link interpreted as meaning a real increase in market access together with its ability to achieve at the multilateral level in the WTO. FTAs are seen as a means of strengthening the implementation of existing international trade rules, such as intellectual property rights. This aim is given some prominence in the recent European Commission paper on the EU in global competition, which provided the vehicle for setting out the current approach to FTA policy.[8]

The policy change from 2006 was aimed to provide a 'New Generation' of FTAs, and the policy shift was considered more of a focus than a fundamental alteration. However, the agreements clearly illustrate a new methodological challenge to international economic law. This is because of the ubiquity of conflicts between rational private interests and reasonable public interests. In other words, it becomes essential to consider because such market failures can arise from restrictive business practices either through governance failure, resulting in more of a governmental market distortion, or through subsidies that are inadequately regulated in the WTO. It is, however, slightly more complex since the citizens are involved through self-interests in a way of 'institutionalizing public reason' through constitutional, legislative, administrative, and judicial rules and institutions protecting 'principles of justice'. These restrictions are in general introduced to limit, at least to some extent, 'market failures' as well as 'governance failures'.[13] The NGFTAs addresses these issues.

The motivations and countries considered in relation to the EU promoting and concluding this type of agreements can be summarised with three different motivations.

The first motivation was an attempt to neutralise potential trade diversion resulting from FTAs concluded by other countries, mainly the US. This was the case with the EU–Mexico agreement, where the agreement was made in order to neutralize trade diversion due to the NAFTA agreement As a result, the negotiation was done with the objective of gaining NAFTA equivalent access to the Mexican market.[14] Other EU FTA initiatives, such as the EU–Central America FTA negotiations, EU–ASEAN and EU–South Korea, have also followed FTAs negotiated or envisaged with the US CAFTA, US–Singapore, US–Thailand and US–Malaysia, and US–Korea and to a lesser extent, Japan. This is considered the first attempt to conclude an

[12] Sieglinde Gstöhl and Dominik Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (2014) 20 European Law Journal 733, pp. 738-739.

[13] Ernst-Ulrich Petersmann, 'Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations' in Stefan Griller, Walter Obwexer and Erich Vranes (eds), *CETA, TTIP, and TiSA - New Trends in International Economic Law* (Oxford University Press 2017), p. 23.

[14] Stephen Woolcock, 'European Union Policy on Free Trade Agreements' (2007) 42 Intereconomics 236, p. 3.

ambitious and comprehensive free trade agreement with priority partners, initiated in 2006,[15] with South Korea, KOREU,[16] providing the new gold standard.[17] In contrary to earlier concluded PTAs, these agreements were primarily based on economic motivations, in order to aim at a high level of trade liberalization.[18] The change led to different bilateral trade agreements, starting with the EU-Korean FTA (KOREU) which, based on its content and members, provokes differences in the system. This shift in policy, therefore, marks a new and more active phase of bilateralism.[19]

The second motivation for the EU to promote this type of agreements can be through establishing strategic links with countries or regions to experience rapid economic growth. For example, this was the case when the negotiation with Mercosur (and Chile) were initiated as a region-to-region agreement in order to promote EU relations with Latin America and support the process of regional integration within Mercosur. The EU–Mercosur and EU–Chile negotiations were in part motivated by a desire to neutralize the potential trade diversion in favour of the US in Latin America. As the prospects of the FTAA faded, so did the impetus behind EU–Mercosur. When the US concluded an FTA with Chile, however, the EU pressed for a bilateral FTA to ensure equivalent access for EU exporters and service providers.

The third motivation for the EU to promote this type of agreements could be through enforcement of international trade rules. This is the new strategy built up by the EU, where the FTAs are seen as a means of strengthening the implementation of existing international trade rules, such as intellectual property rights. The Commission specifically outlines this in its recent paper on the EU in global competition. The FTAs should provide a vehicle for setting out the current approach to FTA policy.[20] The European Commission expressed it as an attempt to use bilateral agreements in a way that would support the returning of the World Trade Organisation (WTO) to the centre of global trade negotiation. It has even been discussed as far as considering the NGFTAs as a laboratory attempt to pursue global trade liberalisation.[21]

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[15] European Commission External Trade 'Global Europe Competing in the World' (n 3). The first stage can be considered to have started in 2006, with the appointment of Peter Mandelson as a new Trade Commissioner, who adopted a new trade strategy entitled 'Global Europe' that provided a new program of bilateral free trade agreements.

[16] European Commission DGTrade 'The EU-Korea Free Trade Agreement in Practice' 2011 <http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf> accessed 4 November 2015, p. 3.

[17] Leif Johan Eliasson, 'Problems, Progress and Prognosis in Trade and Investment Negotiations: The Transatlantic Free Trade and Investment Partnership' (2014) 12 Journal of Transatlantic Studies 119, p. 125.

[18] European Commission, Communication Global Europe - Competing in the world (n 6), p. 18.

[19] Woolcock, 'European Union Policy on Free Trade Agreements' (n 14) p. 2.

[20] Ibid, p. 4.

[21] European Commision 'Trade for All - Towards a More Responsible Trade and Investment Policy' (n 10), p. 29.

The agreements chosen for this research are agreements which stand out due to its bilateral deep comprehensive far integrating. These agreements are the KOREU, CETA, Singapore, EU–Japan and EU Vietnam, and EU TTIP.

1.3 The Policy Change in Relation to the EU Common Commercial Policy

The idea behind a more advanced bilateral trade agenda was based on competitive liberalisation, with discussions that begun in the mid-1990s.[22] Competitive liberalisation was about delivering liberalisation through increased market access, with a more efficient or equitable implementation of relevant norms, through bilateral and regional initiatives.[23]

The development of the common investment policy is considered to have created a new era for the EU's external economic relations. Areas, which were previously under the Member States' competences, are now considered to fall within the EU's external exclusive competence. An example is Article 113 EEC that provided for the policy tools, which included unilateral measures such as changes in tariff rates, export and import policies, commercial defence measures, and the establishment of contractual relations with third countries. However, the provision is not specifying whether the competence should be extended beyond the traditional focus on trade.[24] Interestingly, it can be considered that the Common Commercial Policy (CCP) institutes a new understanding of the EU external action and free trade agreements. Seen from the newly negotiated FTA, the EU can be considered to be pursuing a more investment-focused direction for the CCP.[25]

The external exclusive competence is not only empowering the EU but is also essential for its function from both internal and external perspectives. If it did not exist, the Member States would have to act individually in external relations; and this, in turn, would undermine the EU's unity and weaken its position in its external trade relations. In this way, it is possible to argue that the scope of the CCP will have to follow the development of international trade. After the Lisbon Treaty, the scope of the EU's exclusive competence was largely widened and

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[22] Fred C Bergsten, 'Competitive Liberalization and Global Free Trade: A Vision for the Early 21st Century' (1996) Working Paper Series WP96-15, Peterson Institute for International Economics <https://piie.com/publications/working-papers/competitive-liberalization-and-global-free-trade-vision-early-21st> accessed 18 February 2017. pp. 97-98.

[23] UN International Law Commission 'Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion of International Law' 2006 <http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.682> accessed 19 November 2016, para. 205.

[24] Article 113 EEC was therefore based on uniform principles and external trade, and should be governed from a wider point of view and not put in a narrow sense to only encompass a precise system with customs and quantitative restrictions. However, this strict interpretation should be non-exhaustive and not close the door to the application in a Community context of any other process intended to regulate external trade. 'A restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.' Opinion of the Court of Justice of 4 October 1979, *(International Agreement on Natural Rubber)*, 1/78, EU:C:1979:224, para. 45.

[25] Paul James Cardwell, 'EU External Relations Law and Policy in the Post-Lisbon Era' in Paul James Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (T.M.C. Asser Press 2012), p. 14.

new areas, which were considered within shared competence prior, were included in the CCP. The CCP now covers the '(...) conclusion of tariff and trade agreements relating to trade in goods and services and the commercial aspects of intellectual property and foreign direct investment'.[26]

The CJEU stated that the EU needs to be in a position, where it can protect itself from the development of international trade through more elaborate means. It is established that the CCP should not, in fact, be regarded as a static policy. Instead, it should take the general developments of international trade into account, and therefore, be considered as an open ended and progressive policy. If the CCP is understood in a static sense, it would become insignificant very quickly because of the rapid development of international trade.[27] For this reason, the fast-growing NGFTAs, together with global commitments in the CCP, make it necessary to balance internal and external actions toward international law requirements. In other words, it is essential to ensure that trade liberalisation does not restrain the EU autonomy.

1.4 Limits of the EU External Action

The limits of the EU as an international actor should be analysed through the CJEU's interpretation of the EU's principle of autonomy. Considering this principle, there is a clear contrast to what is reflected in the EU's international commitments in the treaties. The concept of autonomy[28] was established in relation to the formation of the internal market,[29] and has been used to protect the EU's institutional prerogatives.[30] The EU should be viewed as a detached system of law.[31] The CJEU expressed that the EU legal order represents a separate legal order from the rest of international law '[b]y contrast with ordinary international Treaties, the EEC Treaty has created its own legal system which … became an integral part of the legal systems of the Member States …'.[32] For the purpose of the EU's external relations, the concept of

[26] Article 207(1) TFEU.

[27] Opinion of the Court of Justice of 15 November 1994, *(World Trade Organization Agreement)*, 1/94, EU:C:1994:384; 1/78, Opinion on International Agreement on Natural Rubber (n 24), para. 44.

[28] Initially, the concept of autonomy was used to support the notion of direct effect and supremacy of the EU law. Direct effect and supremacy are tools used to organise and regulate the internal relationship of the EU with the 28 domestic legal orders, all combined into one. In a way, autonomy could, for the sake of the internal engagement, be understood as referring to the integrity of the treaty of the EU. However, this would only be to the extent of reaching an effective implementation in order to hinder a circumvention of the implementation by recourse to a domestic legal system in one of the Member States. Judgment of the Court of Justice of 15 July 1964, *Flaminio Costa v E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66.

[29] Conceptual framework to which *Van Gend* and *Costa* were instrumental. The broader implications of the Court's reasoning were not apparent until the early 1990's.

[30] Hannes Lenk, 'Investment Arbitration under EU Investment Agreements: Is There a Role for an Autonomous EU Legal Order?' (2017) 28 European Business Law Review 135, p. 136.

[31] Christian Tietje and Clemens Wackernagel, 'Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration' (2015) 16 Journal of World Investment & Trade 205, p. 215. It is further highlighted that there is no reference mentioned in relation to the EU's position or affiliation with international law.

[32] C-6/64, Costa v. E.N.E.L. (n 28), para. 593. This case concerned the question of the status and effect of the EEC Treaty in the domestic legal orders.

autonomy can be considered to exclude international law from having an impact on the interpretation and application of EU law, within the respective domestic legal order of the Member States, which is, in essence, very similar to the international dimension of the EU autonomy.[33] Furthermore, the principle of autonomy focuses on the protection of institutional structures and prerogatives, with the result of withdrawing the institutional dimension of the EU from the oversight of international law.[34] It is also possible to conclude that the CJEU has extended the scope of autonomy *vis-a-vis* other international legal regimes to include its institutional framework. This is because of its increasing engagement in international *fora*, which triggers questions regarding the legal and institutional relationship of the EU with international law.[35]

In relation to the NGFTAs, the principle of autonomy plays an important role. The principle of autonomy function as a guiding principle in the attempt seeking to preserve the integrity of EU law from being undermined by international law.[36] This is namely because of the establishment of the dispute settlement mechanisms with respect to the relation between the EU legal order and international courts and tribunals. The EU encounters increasing difficulties in relation to the legal and institutional requirements for its role as an actor in international investment law.

2 The Scope of NGFTAs

Considering the agreements together with the continuously increasing change in policy in these newly negotiated agreements, it is possible to suppose that the agreements are reaching further than previous concluded bilateral agreements between the EU and third states, which may be described as the WTO-beyond.[37] The development of the EU's trade policy is based on the new era of the EU's external economic relations i.e. the EU's investment policy. The investment policy clearly marks more investment-focused provisions in the new generation of

[33] René Barents, *The Autonomy of Community Law* (Kluwer Law International 2004), p. 259. Barents traces the roots of autonomy back to the case law of the ECSC-Court.

[34] In his seminal work, Schilling presented an attempt to conceptualize the position of the superiority of the CJEU to the domestic courts of the Member States by recourse to theoretical concepts in internationalism or constitutionalism. In his work, Weiler contested Schilling's findings and discusses the theoretical foundations of the institutional aspect of the autonomy of the EU legal order in its internal dimension. Theodor Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 Harvard International Law Journal 389.

[35] Christina Eckes, 'The European Court of Justice and (Quasi-) Judicial Bodies of International Law' in Ramses A Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (T.M.C. Asser Press 2013).

[36] Jed Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (2016) 07/2016 <http://cadmus.eui.eu/handle/1814/41046>, accessed 29 July 2017.

[37] After thorough analyses of the agreements, the concept has been invented.

FTAs.[38] Introducing a regulatory framework that, on the one hand, preserves the protection of foreign investors and, on the other hand, enhances their investment opportunities was considered in the Commission's Proposal.[39] This sets the basic foundations for the establishment of a complete and successful EU investment policy, affirming the main competences of the EU in the field, and the main elements of the EU future investment policy.

This type of agreements covers a wide range of subjects and requires implementation through extensive revision and ratification by the Member States.[40] They do not only cover provisions regarding trade of industrial goods but also other rules of trade liberalization, elimination of tariffs and non-tariff barriers, further liberalization in services, public procurement investment, competition, and enforcement of intellectual property rights. In addition to competition policy and potential dispute settlement mechanisms.[41]

Similarly, this type of agreements also covers chapters on sustainable development in accordance to the EU 2030 Agenda, which has the potential to trigger the necessary transformation of EU external action in support of EU values and objectives.[42] Including these chapters has provided the role to ensure that trade and investment liberalisation does not deteriorate environmental and labour conditions.[43]

NGFTAs are essential for liberalising trade among involved parties by abolishing nearly all tariffs and other obstacles to trade.[44] At the same time, they allow each party to maintain external barriers to trade with non-signatory countries.[45]

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[38] Cardwell, 'EU External Relations Law and Policy in the Post-Lisbon Era' (n 25), p. 14.

[39] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union, (Proposal for a Regulation Framework for Screening of Foreign Direct Investments into the European Union)' COM (2017) 487 final.

[40] European Commission External Trade 'Global Europe Competing in the World' (n 3). European Parliament, 'Legislative Resolution on the Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries, (Legislative Resolution on Establishing Transitional Arrangements for Bilateral Investment Agreements)' COM (2010) 0344 final.

[41] Gstöhl, Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (n 12), p. 739.

[42] European Commission 'The New European Consensus on Development 'Our World, our Dignity, our Future' - Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the European Commission' 2017 <https://ec.europa.eu/europeaid/sites/devco/files/european-consensus-on-development-final-20170626_en.pdf> accessed 15 April 2017, para. 9.

[43] European Parliament 'Briefing paper: Trade and Sustainable Development Chapters in CETA' 2017 <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)595894> accessed 12 January 2018, p. 1.

[44] Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions - The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35 Journal Of World Trade 1081, p. 302.

[45] Patrick F J Macrory, Arthur E Appleton and Michael G Plummer, *The World Trade Organization: Legal, Economic and Political Analysis*, vol 1 (Springer 2005), p. 274. The external tariff provides a clear difference between an FTA and a Customs Union. An FTA allows its members to set tariff rates independently and is therefore free to establish its own desired tariff rates in relation to imports from non-signatory countries. In a customs union the external tariff rate is set and requires all parties to the agreement to establish identical external tariffs. Where countries that are not signatories to FTAs, tries to seek to circumvent the tariff to export to the signatory country with the lowest external tariff it can create an uneven field.

Since there is no standard on how to negotiate FTAs, it becomes even more essential to contextualize the agreements in order to reach a comprehensive understanding of the differences provided by the change in the EU's trade policy. In order to grasp the NGFTAs as a new form of FTA, it is necessary to consider better categorization through a thorough analysis of the content of the agreements.

2.1 The Definition of NGFTAs

There have been several attempts to conclude international agreements for investment,[46] such as the unsuccessful attempt by the Multilateral Investment Guarantee Agency (MIGA) to reach a framework to promote FDI,[47] or the Doha round.[48] The negotiations which led to the Doha round concerned trade in agriculture, even the continued negotiations in relation to service disciplines never reached a conclusion.

When defining the NGFTAs the content plays a significant role. The 'Global Europe' trade strategy explicitly points out that NGFTAs can build on international rules and go '(...) further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion'.[49] The NGFTAs cover the so-called 'Singapore issues',[50] which constitute areas such as investment, public procurement, competition, or enforcement of intellectual property rights.

The NGFTAs contain rules that govern capital movement such as '(...) restrictions on the free movement of capital relating to direct investments made in accordance with the laws of the host country, to investments and other transactions [liberalized with regards to trade in services and electronic commerce].'[51]

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[46] UNCTAD United Nations Conference on Trade and Development, 'South-South Cooperation in International Investment Arrangements' (2005) NCTAD/ITE/IIT/2005/3 Series on International Investment Policies for Development <http://unctad.org/en/docs/iteiit20053_en.pdf> accessed 26 March 2017, p. 8.

[47] Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010), pp. 104-105.

The MIGA attempted to reach an international framework to promote FDI. However, it has resulted in 'Guidelines on the Treatment of Foreign Investment' which is not legally binding but providing the foundation to other important legal instrument such as BITs.

[48] Jones Kent Albert, The Doha Blues: Institutional Crisis and Reform in the WTO (Oxford University Press 2010); Ernst-Ulrich Petersmann, CETA, TTIP, and TiSA-New Trends in International Economic Law, in Stefan Griller, Walter Obwexer, and Erich Vranes 'Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations', p. 26.

[49] European Commission External Trade 'Global Europe Competing in the World' (n 3), p. 10.

[50] The 'Singapore Issues' refers to transparency in government procurement, trade facilitation (customs issues), trade and investment and competition policy.

[51] Article 8.2, Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part OJ L 127/6 ; This is similarly provided Article 30.5, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23; Singapore Chapter 16, EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018) Article 16.7, Agreement between the European Union and Japan for an Economic Partnership [2018] N.Y.P; Article 9.2, EU-Vietnam Free Trade Agreement: Agreed text as of January 2016 [2016] N.Y.P.

The NGFTAs provide two basic provisions in relation to markets. Firstly, they provide 'background' rights and obligations, including enforcement of rules. Such rules further provide stability for investment and incentives, enable the competition that is necessary for an effective function of the market, to flourish, and enhance the productive capacity. Secondly, they function to conduct norms that represent the EU's claims on their markets, relating to both participating and affected markets. They provide a mean, by which a fabric of norms, practices, and understandings is created. This determines the way markets operate, influences the outcomes production, and shapes consequences for business affected by them.[52]

These agreements can all be considered stepping-stones for attempts for further liberalisation. In this context, it is important to better define these instruments of the EU external action by considering the idea behind their introduction together with the content of the actual agreements.

2.1.1 The Idea behind the NGFTAs

The idea behind NGFTAs was to boost the EU's economic growth and employment levels by improving the global competitiveness of European companies.[53] It started through the need for a change in the era when the EU attempted to pursue multilateral trade arrangements. Primarily, this need for change was due to many reasons; one of them was related to the old-fashioned philosophy underpinning WTO rules on trade, where the former idea of producing items in one country and exporting them to another country has changed in this globalized world, whereas now the production is set in many different countries and then sold in a third country. This led to discussions on negotiation, specifically in relation to trade in services, but also other trade rules in relation to agriculture, and taken up in the Doha round which was then stalled due to an inability to reach a consensus among the WTO members.[54] The failed Doha round therefore contributed, in some way, to undermine the WTO, both in relation to its role as a global negotiation forum, and also in relation to its substantive disciplines.[55]

This is because cooperative strategies for overcoming such barriers such as mutual recognition and equivalence, regulatory coherence, and regulatory cooperation are proven areas

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[52] David J Gerber, *Global Competition: Law, Markets, and Globalization* (Oxford University Press 2010), p. 4.

[53] European Commission, 'Towards a Comprehensive European International Investment Policy Communication from the Commission to the Council, the European Parliament, European Economic and Social Committee and the Committee of the Regions, (Communication Towards a Comprehensive European International Investment Policy)' COM (2010) 343 final.

[54] The intention was to reform the WTO system by lowering trade barrier and amending trade rules. Due to complexity of the topics and antagonistic interest and the WTO's cumbersome consensus-based decision-making process, the process was stuck.

[55] Stefan Griller, Walter Obwexer and Erich Vranes, 'Mega-Regional Trade Agreements' in Stefan Griller, Walter Obwexer and Erich Vranes (eds), *Mega-Regional Trade Agreements : CETA, TTIP, and TiSA : New Orientations for EU External Economic Relations* (Oxford University Press 2017), p. 6.

to be very difficult to negotiation in the multilateral WTO context.[56] Consequently for broader FTA, the WTO is no longer an adequate forum for negotiation, specifically not in relation to regulatory issues, which provide more economically important obstacles to international trade, such as non-tariff barriers, resulting from different domestic risk preferences and national regulatory cultures, and quite often from the pursuance of legitimate goals through different means.

This further led to the change of focus which made the EU move away from multilateral trade and instead focus on bilateral attempts to reach similar agreements with new trading partners.[57] Bilateral FTAs maintain the importance of WTO because of the central role they were given in international trading regimes. Competitive liberalisation was about delivering better liberalisation through increased market access with a more efficient or equitable implementation of relevant norms, through bilateral and regional initiatives.[58]

Through launching the 2020 strategy, the EU tried to improve the overseas market through bilateral FTAs and deepened the relationship with third countries in service, competition, intellectual property, social environmental and labour issues, as well as in other regulatory cooperation.[59] This was moreover clarified by the 'Global Europe' trade strategy which explicitly points out that NGFTAs can, with these subject areas, build on international rules and go '(...) further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion'.[60]

Through the commitments of the signatory parties to remove trade barriers that may exist between them,[61] the NGFTAs, can be considered to provide a new forum for regulatory cooperation[62] to address other broader issues such as those related to social and economic activities.[63]

The agreements negotiated or concluded after the EU's Global Europe strategy in 2006, are the EU–CARIFORUM agreement between the EU and the Caribbean Group of the African,

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[56] Ibid, p. 6.

[57] Ibid, pp. 6-7

[58] UN International Law Commission 'Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion of International Law' (n **23**), para. 205.

[59] European Commission, 'Communication from the Commission Europe 2020: A strategy for Smart, Sustainable and Inclusive Growth, (Communication Europe 2020 strategy)' COM (2010) 2020 final.

[60] European Commission External Trade 'Global Europe Competing in the World' (n 3), p. 10.

[61] Neil Nugent, *The Government and Politics of the European Union* (7th edn edn, Palgrave Macmillan 2010), pp. 372-376.

[62] Traditionally regulatory cooperation has taken a variety of forms, through formal governmental agreements, to international intergovernmental organisations, or informal networks of regulators. It has now formed a basis for the discourse of preferential and free trade agreements (PTAs and FTAs), Stanko S Krstic, 'Regulatory Cooperation to Remove Non-tariff Barriers to Trade in Products: Key Challenges and Opportunities for the Canada-EU Comprehensive Trade Agreement' (2012) 39 Legal Issues of Economic Integration 3, p. 3.

[63] Tracy Epps, 'Regulatory Cooperation and Free Trade Agreements' in Susy Frankel and Meredith Lewis (eds), *Trade Agreements at the Crossroads* (Routledge 2014), p. 142.

Caribbean and Pacific Forum, and furthermore the agreements with Colombia, Peru, Singapore, South Korea, and the CETA agreement with Canada, Japan, Vietnam, China and Myanmar, and Algeria, India, Libya, and the TTIP agreement with the US.[64] Since this thesis attempts to only focus on bilateral trade agreements, naturally the CARIFORUM agreement will not be considered. The remaining agreements and their content will be discussed in a more thorough analysis.

There have been many attempts to contextualize this type of new trade agreements; as 'mega-regional trade agreements', 'deep-comprehensive trade agreements' or as the 'new generation of free trade agreements'. The way these concepts have been used varying from a more political standpoint to a more economical analysed conclusion. It is therefore necessary to address the earlier attempts and focus on how the NGFTA differ in relation to the previous classification and why it was chosen as an all-encompassing terminology.

The classification, used for the agreements falling under the terminology of mega trade agreements,[65] is based on their economic impact in terms of their holding a major share of world trade and FDI, but also in relation their functions and their political and geopolitical implications.[66] This term has been coined to signify the outstanding combination of ambition and trade coverage as well as the inclusion of important supply chain hubs.[67] The trade deals aim to improve regulatory compatibility and to provide a rule-based framework to regulate in order to better adjust to the differences within the different countries' regulatory environment. Within Mega regional agreements the TPP and the TTIP are both examples. In this case the TPP has 26,3% and the TTIP has 43,6% of the global FDI.

Other attempts to categorize this type of agreements has been done. It could be regarded as more sufficient to consider the trade agreements in relation to their contents and their ability of enforcing subject areas going beyond the WTO. This was primarily established by Horn, Mavroidis, and Spir who argued that there is a way to recognize the different possible compatibilities with the WTO. Considering the anatomies of PTAs, one can deal with their compatibility to the WTO through either WTO-plus or WTO-extra.[68] This has thereafter been coined as a definition for other scholars such as Ahearn.[69]

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[64] Billy A. Melo Araujo, 'Regulating Services through Trade Agreements - A Comparative Analysis of Regulatory Disciplines Included in EU and US Free Trade Agreements' (2014) 6 Trade, Law and Development

[65] Griller, Obwexer, Vranes, 'Mega-Regional Trade Agreements' (n 55), p. 9.

[66] Peter-Tobias Stoll, 'Mega-Regionals: Challenges, Opportunities and Research Questions' in Thilo Rensmann (ed), *Mega-Regional Trade Agreements* (Springer International Publishing 2017), p. 5.

[67] Peter-Tobias Stoll, 'Mega-Regionals: Challenges, Opportunities and Research Questions' in Thilo Rensmann (ed), *Mega-Regional Trade Agreements* (Springer International Publishing 2017), p. 5.

[68] Henrik Horn, Petros C Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33 World Economy 1565, pp. 20-28.

[69] Raymond J. Ahearn, 'Europe's Preferential Trade Agreements: Status, Content, and Implications' (2011) CRS Report for US Congress <http://www.fas.org/sgp/crs/row/R41143.pdf> accessed 22 March 2012., p. 3.

In more detail, the 'WTO-plus' refers to agreements that have commitments that are, essentially, building upon areas already agreed on at the multilateral level, e.g., a further reduction in tariffs.[70] This type of agreements contain provisions enforceable within the context of the WTO. In this regard it is necessary to identify provisions which are legally enforceable within the agreements, since they should be sufficiently precise for to be a legally enforceable obligation, however, this requirement does not automatically translate into whether or not a dispute settlement is available. Even when such provision is considered an enforceable obligation, the provision may be accompanied by an explicit statement that dispute settlement is not available.

In other words, they include obligation in relation to policy areas that are already subject to some of WTO commitment. There are two ways in which this can be addressed; either through reconfirming existing commitments, or through providing for further obligations. For example, it could be that the reduction in tariffs is going beyond what is already committed to in the WTO context, and this is what makes them WTO-plus. It could also be through SPS (sanitary and phytosanitary) measures, TBT (technical barriers to trade) measures, antidumping, state aid, and obligations covered by the GATS. Similarly, those intellectual property rights provisions which address issues falling under the TRIPs agreement. Export taxes could also be considered in this regard.[71]

The areas applicable to the WTO-plus category are FTA agricultural product, FTA industrial products, customs administration, IP export taxes, TBT/SPS, state trading enterprises, antidumping, countervailing measures, state aid, public procurement, TRIMs, GATS, TRIPS, and investment.

The WTO-extra relates to commitments that go beyond issues that are dealt with at the WTO level, such as labour standards.[72] It could be a more precise provision containing areas such as anti-corruption, competition, environment, IP rights, investment, labour, movement of capital, and social matters. The WTO-extra takes into consideration areas, which are qualitatively new in relation to policy instruments, and have not previously been regulated by the WTO. There are no obligations in relation to environmental protection. Thus, it is possible to classify an environmental obligation as WTO-extra. This is similar in relation to labour laws or movement of capital. The Preamble of the WTO clearly points out the need 'to protect and preserve the environment.' However, there are no provisions specifically addressing the

[70] Henrik Horn, Giovanni Maggi and Robert W Staiger, 'Trade Agreements as Endogenously Incomplete Contracts' (2010) 100 The American Economic Review 394.

[71] The WTO contains no precise commitment in this area. The WTO members could negotiate commitments on export taxes under Article II GATT, so it can be argued that a WTO instrument already exists in this area.

[72] Horn, Maggi, Staiger, 'Trade Agreements as Endogenously Incomplete Contracts' (n 70).

conduct of environmental policies with a trade impact, which leads to the conclusion that it should be considered as a WTO-extra category.

However, in relation to the NGFTAs, does not fully fit into the WTO-extra group. Although the NGFTAs have commitments that go beyond issues that are dealt with at the WTO level, competition, environment, IP rights, investment, labour, movement of capital, and social matters, they take it one step further. This categorization does not encompass the whole picture of the NGFTAs, since the NGFTAs places a clearer emphasis on enforcement specifically in relation to investment issues by introducing the Investment Court System (ICS). For this reason and for the purpose of this thesis, the NGFTAs should be classified as a separate group, i.e. 'WTO beyond'.

2.1.2 The Contents of NGFTAs

The EU's announcement of the comprehensive international investment policy justified the EU's aim to include investment liberalisation and protection issues in future trade and investment agreements. The format to conclude was not initially set but was to include either sector specific and/or have investment related provisions,[73] such as in the case of NGFTAs.

The NGFTAs provide a more extensive opening of foreign markets and mark a far-reaching policy shift. For this reason, the former role that FTAs have played in the EU's external relations has been somewhat redefined.[74]

Addressing liberalisation of trade through the reduction and elimination of trade barriers, NGFTAs have placed emphasis on denying the barriers to trade, known as 'behind-the-door' barriers to trade. They are considered, in relation to domestic regulations such as health regulations, making it difficult for goods to enter foreign markets, and prevent the entry of products, or obstruct foreign services suppliers to provide their services and operate in foreign markets. Consequently, the NGFTAs can be defined as commitments of the signatory parties to remove trade barriers that may exist between them.[75]

The NGFTAs are furthermore considered to be a stepping-stone for further liberalisation due to their abilities to tackle issues that are not yet ready for multilateral discussions. It is necessary to define these instruments, and thoroughly address their origin for better and clearer understanding. Considering the content of the agreements negotiated by the EU, there are clearly agreements going beyond the WTO in terms of the enforceability within the WTO but instead creating or attempting to create a possibility to solve disputes in a mechanism which

[73] European Commission, Communication on Europe 2020 Strategy (n 59), p. 7.

[74] Boris Rigod, 'Global Europe: The EU's New Trade Policy in its Legal Context' (2012) 18 Columbia Journal of European Law 277.

[75] Nugent, *The Government and Politics of the European Union* (n 61), pp. 372-376.

will be enforceable between the parties. In this way the agreements clearly differ from earlier FTAs.

The NGFTAs go beyond WTO issues, and cover issues that have been rejected earlier for multilateral negotiations.[76] Both, the EU's external presence and capacity to act on an international level have been considered central. Interpreting and applying rules of international and regional trade are becoming increasingly a more specialized field. The EU can, therefore, in contrary to some opinions such as the opinions of Young,[77] no longer only be considered as an influential global regulator with unilateral adoption of its rules by third countries. Instead, the EU makes use of FTAs as tools for fostering its normative standing. This is because the EU's external action contributes, more than before, to the shaping of the EU's international identity. The key central aspect for the EU to act on an international level through this type of agreements is through its presence and capacity. The provisions of each agreement are important and need to be examined when analysing the agreements as legal instruments of the EU's external relations.[78] In this regard, the 'New Generation' of agreements creates opportunities for growth and further development.[79] These agreements, which go beyond dismantling tariff and non-tariff barriers, address subjects, which are sometimes not related to trade, such as human rights and freedom, environmental protection, and the fight against corruption.[80]

The WTO-beyond that constitutes the NGFTAs is therefore a platform considered to enhance regulatory cooperation where it can be advanced in order to address broader social and economic issues.[81] Particularly, these agreements go further and deeper in economic integration than earlier agreements, in terms of regulatory cooperation, section specific standardisation, public procurement, competition, environmental protection, IP rights, sustainable development, movement of capital, and investment protection.

Consequently, because of the attempt of the NGFTA to fill the gap between the earlier agreements in terms of their legal commitment and effective enforcement by the EU, the NGFTA can be considered the new generation of FTA.

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[76] The 'Singapore Issues' refers to transparency in government procurement, trade facilitation (customs issues), trade and investment and competition policy. Referred to in Chapter I Section 1.1.

[77] Alasdair Young, 'Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-ordination in the EU's "New generation"' Preferential Trade Agreements' (2015) 22 Journal of European Public Policy 1253, p. 1253.

[78] James Harrison, 'An Introduction to the Legal Framework for EU-Korea Relations' in James Harrison (ed), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press 2013), p. 5.

[79] European Commission External Trade 'Global Europe Competing in the World' (n 3), p. 3.

[80] Gstöhl, Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (n 12); European Commission External Trade 'Global Europe Competing in the World' (n 3).

[81] Epps, 'Regulatory Cooperation and Free Trade Agreements' (n 63), p. 142.

2.2 The Origin of NGFTAs

This type of free trade agreements provides for preferences among their parties. Accordingly, they are often called 'preferential trade agreements' (PTAs). However, the term 'free trade agreements' is also frequently used, and, in WTO jargon, the agreements addressed here are usually called 'regional' trade agreements.[82]

With the NGFTAs, the EU aims to pursue deeper integration in order to ensure that the rules developed in major markets are consistent with EU law. This type of agreements pursues 'deep integration partnerships between countries or regions with a major share of world trade and foreign direct investment'. In order to be able to provide a fair analysis of the agreements as EU legal instruments for external trade, it is necessary look more closely at areas which are similar to previous agreements negotiated by the EU. In this way, considering it as the background to view the context of the agreement in a broader international legal framework.

The NGFTAs are a new instrument that can be considered to be based on preferential trade agreements, WTO, other international commitments, and also international investment treaties. For this reason, it seems appropriate to discuss the different areas which has enabled it to become NGFTAs, i.e. the influences that arises from preferential investment treaties and International law.

2.2.1 Influences from Preferential Trade Agreements

The terms PTA and FTA are often used indistinctively to describe preferential trade agreements. The term FTA is more widely used to describe all preferential trade agreements that are not considered to be customs unions.[83] The Preferential Trade Agreements (PTA) contain no standardisation in terms of areas which should be included within the negotiation. The trade negotiations are flexible on so called case-by case basis.[84] To a large extent it depends on the content of the negotiated agreement; certain agreements are shaped in relation to foreign security policy, whereas others reflect more commercial considerations.[85]

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[82] Peter-Tobias Stoll, 'Towards Mega-Regionalism in International Economic Law' in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (The Lypiatts 2017).

[83] 'A preferential trade agreement PTA is a trade agreement wherein trade barriers between partners are less than the barriers facing non-members, whereas a free trade agreement FTA is a PTA that eliminates all barriers to trade between partners, in practice several FTA should in fact more correctly be termed as they do not provide for completely free trade between partners. FTAs are also different from costumes unions as members of an FTA maintain their own tariffs, quotas and other non-tariff barriers vis-à-vis non-members' 'Regional and Preferential Trade Agreements: A Literature Review and Identification of Future Steps' (2003) Report No 155 Dansk Fødevareøkonomisk Institut, University of Copenhagen <https://curis.ku.dk/ws/files/127718299/FOI_Rapport_155.pdf> accessed 25 April 2017.

[84] 'European Union Policy Towards Free Trade Agreements' (2007) 03 ECIPE Working Paper <http://ecipe.org//app/uploads/2014/12/european-union-policy-towards-free-trade-agreements.pdf> accessed 20 September 2016., p. 4.

[85] Ibid.

NGFTAs as agreements are similar to preferential trade agreements (PTAs) that have been negotiated by the EU since 2006,[86] and are in this regard, not very innovative.[87] There are different types of PTAs. Some are merely framework agreements, which are set up as an institutional structure, laying down general principles with respect to the commitment of further investment liberalization, promotion, and protection. Other agreements are more remarkable when it comes to their legal character, institutional framework mechanism, and related effects.[88] Generally, the PTA as used because topics addressed in WTO rules can be dealt with more effectively through PTAs for example trade in services, intellectual property and trade facilitation.

There is, however, a clear difference between the PTA and NGFTAs in terms of market liberalisation. The PTA has often been applying a very modest market liberalisation. This is merely because of its nature where the emphasis in more on development or neighbour policy instrument.[89] However, in recent years it has come to increasingly include chapters on investment.

2.2.2 Influences from International Bilateral Investment Treaties

The investment provisions in the NGFTAs are not based on a particular standard. However, when it comes to the negotiation of NGFTAs, it seems that the EU does not significantly deviate from the negotiation of more traditional International Investment Agreements (IIAs).[90] The NGFTAs go also beyond the format of the Member States' Bilateral Investment Treaties (BITs), which include market access issues and securing non-discriminatory treatment of investors.[91]

The BITs and IIAs differ in some circumstances. Property protection against expropriation and ISDS, which have always been featured in BITs, have so far been excluded from the scope of IIAs.[92] The EU is seeking to regulate FDI and portfolio investment,[93] but

[86] The EU has since 2006 negotiated free trade agreements with South Korea, Singapore, Colombia, Peru and Ecuador, Ukraine, Georgia and Moldova, as well as Canada (the Comprehensive Trade and Economic Agreement, hereafter 'CETA'), and negotiations are on-going with India, Malaysia, Vietnam, Thailand, Japan and now the USA.

[87] World Trade Organisation 'The WTO and Preferential Trade Agreements: From Co-existence to Coherence' 2011 <https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf> accessed 8 October 2017, pp. 48-54.

[88] UNCTAD, 'South-South Cooperation in International Investment Arrangements' (n 46), p. 42.

[89] Raymond J Ahearn, 'Europe's Preferential Trade Agreements: Statues, Content and Implications' (2012) 23 Current Politics & Economics of Europe 181.

[90] August Reinisch, 'The Future Shape of EU Investment Agreement' (2013) 28 ICSID Review: Foreign Investment Law Journal 179, p. 184.

[91] European Commission, Communication Towards a Comprehensive European International Investment Policy (n 53), p. 3.

[92] Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011), p. 339.

[93] European Commission, Communication Towards a Comprehensive European International Investment Policy (n 53), p. 8.

also, at the same time, respect standards of investment protection, such as the Fair and Equitable Treatment (FET), full protection and security treatment, and expropriation.[94]

The investment policy regulation cannot be viewed in isolation; it has to fit with other areas of the EU's regulation on economic activity within the EU and beyond. For this reason, there is a need to also find consistency with the internal policies of the EU including, for example, policies on the environmental protection, decent work, health and safety at work, consumer protection, cultural diversity, development policy, and competition policy. The practice of the NGFTAs will better show the result of such consistency.[95] These objectives remain at the heart of the EU's investment policy.[96] Adhering to these objectives, the EU seems to prioritize the demand for increasing investment flows and addressing the role of regulation of admission of foreign investment, in particular in the field of services, as a major economic determinant of foreign investment.[97]

In addition to liberalisation and competitiveness, the EU's investment policy intends to focus also on the more 'neglected' goals of international regulation of foreign investment. The EU's institutions, in particular the Parliament, attempt to link foreign investment with development and broader public policy considerations. Building on provisions found under existing EU's agreements with third countries', such as those on investors' behaviour, maintenance of standards, and investment promotion, the EU's institutions aim to distance from the obscurity that characterises development and public policy concerns in most BITs.[98] The different content of the EU's IIAs illustrates the different regulatory aims that the EU's investment policy was pursuing so far. Putting the emphasis on admission and operation of foreign investment is linked with the pursuance of the goals of liberalisation, market access, and competitiveness.[99] In comparison to NGFTAs, the IIAs lack absolute standards of treatment, such as fair and equal treatment, provided only from the most favoured nation, and national treatments which are in fact applied and interpreted differently than the same standards used in BITs. Thus, the NGFTAs cannot be considered as a replication of primary EU law or the GAT provision. They have sufficient original elements that can justify their characterization as innovative models for international regulation of foreign investment.

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[94] Ibid, pp. 8-9.

[95] Ibid, p. 9.

[96] Stephen Woolcock and Jan Kleinheisterkamp, 'The EU Approach to International Investment Policy After the Lisbon Treaty, Communication on Investment Policy' (2010) European Parliament Directorate General for External Policies <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA_ET(2010)433854_EN.pdf> accessed 11 November 2016, p. 9.

[97] Ibid, p. 9.

[98] Ibid, pp. 39-40; European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy [2011] OJ CE 296/34, 6.

[99] Angelos Dimopoulos, 'Shifting the Emphasis from Investment Protection to Liberalization and Development: The EU as a New Global Factor in the Field of Foreign Investment' (2010) 11 Journal of World Investment & Trade 5, pp. 17-18.

2.2.3 Influences from International Law

The NGFTAs go beyond WTO issues, and cover issues that have been rejected earlier for multilateral negotiations.[100] Both the EU's external presence and capacity to act on an international level have been considered central. Interpreting and applying rules of international and regional trade are increasingly becoming a more specialized field. The EU can, therefore, in contrary to some opinions such as Young, no longer be only considered as an influential global regulator with unilateral adoption of its rules by third countries.[101] Instead, the EU makes use of FTAs as tools for fostering its normative standing. This is because the EU's external action contributes, more than before, to the shaping of the EU's international identity.

Even though the EU is characterized as a model of regional integration, it has been recently presented as a project for liberalization, or economic governance at a global level. There are responsibilities attached to the further liberalisation through bilateral FTAs. They are also called 'WTO-plus obligations' in areas that are subject to WTO rules, such as the TBT.

There is a requirement to seek WTO compatibility,[102] since the contracting parties of the NGFTAs are members of the WTO. Concerning trade in goods or services, the members of the WTO may enter into PTAs. When it comes to trade in goods, the parties of a PTA are allowed to favour products originating from their countries.[103] Two different forms of PTAs can be distinguished according to Article XXIV General Agreement on Tariff and Trade (GATT): free trade areas and customs unions (CUs).[104] These two different areas need to correspond to the GATT rules in different manners. Regarding the free trade areas, trade is liberalised between the parties; whereas the party in an EU agreement must also, beyond the liberalisation of trade commitment, agree on a common trade policy in relation to the rest of the WTO members.[105]

In this regard, the Commission recognized that certain aspects of the Standard Investment Protection and ISDS regimes are unsatisfactory and aspires to improve them. Whether the new EU's policy, which includes investment protection, is consistent with the new set of FTAs depends on the assumptions about the nature of the international trading system. It also relates to whether such agreements would be compatible with the WTO.

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[100] The 'Singapore Issues' refers to transparency in government procurement, trade facilitation (customs issues), trade and investment and competition policy. Referred to in Chapter I Section 1.1.

[101] Young, 'Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-ordination in the EU's "New generation"' Preferential Trade Agreements' (n 77), p. 1253.

[102] Marise Cremona, 'Flexible Models: External Policy and the European Economic Constitution' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU from Uniformity to Flexibility?* (2000).

[103] Article XXIV, World Trade Organization, General Agreement on Tariffs and Trade [1986].

[104] Horn, Mavroidis, Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (n 68), p. 8.

[105] Article XXIV, World Trade Organization, General Agreement on Tariffs and Trade.

The key central aspect for the EU to act on an international level through the NGFTAs of agreements is through its presence and capacity. This addresses the need to seek a new balance between protectionism and liberalising of markets.

The EU uses traditional defence of markets and producers, trade defined instruments, and market power to protect domestic markets and policy choices starting from farm policy to the assessment of regulatory risk; this will be further addressed through the autonomy of the EU. The EU also uses its economic power to leverage and open up markets, offering market access in return for reciprocal benefits. The move towards reciprocity in its contractual trade relations, for example, may be presented in terms of WTO-compatibility, but may also signal the importance of market access to the EU.[106] In this regard, the NGFTAs creates opportunities for growth and further development.[107] These agreements, which go beyond dismantling tariff and non-tariff barriers, address subjects, which are sometimes not related to trade, such as human rights and freedom, environmental protection, and the fight against corruption.[108]

Provisions of each agreement are important to examine when analysing the agreements as legal instruments of the EU's external relations.[109]

The WTO is considered to be a cornerstone in all of these agreements. This can be shown by considering the provision in each of the agreements. The CETA provides that the parties shall further strengthen their close economic relationship by building upon their respective rights and obligations established in the WTO.[110]

The parties affirm rights and obligations under each other's commitments under the WTO and other agreements to which they are party.[111] The Singapore and the Vietnam agreement states that is building on each parties respective rights and obligations under the WTO agreement and other multilateral, regional and bilateral arrangements.[112] [113] The free trade area should therefore be consistent with Article XXIV of GATT 1994 and Article V of GATS.[114] [115] This is portrayed in a similar manner in the EU-japan agreement.[116]

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[106] Cremona, 'Flexible Models: External Policy and the European Economic Constitution' (n 102).

[107] European Commission External Trade 'Global Europe Competing in the World' (n 3), p. 3.

[108] Gstöhl, Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (n 12); European Commission External Trade 'Global Europe Competing in the World' (n 3), p. 735.

[109] Harrison, 'An Introduction to the Legal Framework for EU-Korea Relations' (n 78), p. 5.

[110] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Preamble.

[111] Ibid., Article 1.5.

[112] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Preamble.

[113] 'EU-Vietnam Free Trade Agreement: Agreed text as of January 2016' 2016, Preamble, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 8 January 2017.

[114] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Chapter One Objectives and General Definitions Article 1.1.

[115] Establishment of a Free Trade Area 'EU-Vietnam Free Trade Agreement: Agreed text as of January 2016', Article 1.1.

[116] Agreement between the European Union and Japan for an Economic Partnership, Preamble.

Consequently, the roles of the WTO are important to respect, and to make sure that it is not overseen within each of the agreements. In the case of the NGFTAs, what may clearly mark them in relation to earlier agreements are their objectives, but also the novel potential possibility to solve and enforce disputes going beyond the WTO discussions through a permanent established investment arbitration mechanism. This would clearly put the agreements in a separate group in relation to the earlier established group. In this specific consideration it is possible to refer to this type of agreements as 'WTO-beyond' since they clearly go beyond the WTO, establishing an arbitral tribunal, in similar manner to that of the WTO.

The WTO is still, however, remaining in the centre of these agreements in an important role and is not, as was earlier feared, neglected by the attempt to pursue this type of dispute settlement. The NGFTA is considered to be the new generation. The new generation because of their attempt to fill the gap that earlier agreements have had i.e. the gap between legal commitment and effective enforcement by the EU. Former agreements, such as the PTA, came with more of legal inflation, in the sense that they cover a wide range of topics going beyond any other commitment taken by the EU and therefore provide more complex legal issues. This naturally led to an issue of the EU as a global actor. This is the case if the agreements were to be entirely unenforceable, which in some cases could even lead to them being entirely devoid of substance. Agreements, for example, with developing countries have come to play a different role and rather functioned as exporting EU laws. Trade policy can therefore at times be considered as well as political means.[117] The NGFTAs have departed from this view in the attempt to create agreements which are enforceable. It is, however, important to consider how the NGFTAs have departed and become different from earlier concluded agreements, which will be discussed in these following sections.

The FTAs are considered a preferred strategy to find better transnational solutions for international regulatory frameworks enforcing protection of investment and property rights. This type of agreement is the first of the bilateral FTAs to include purely commercial goals pursuant to the Europe 2020 strategy,[118] whereas the past FTAs almost solely existed within the framework of other policies.

Distinguishing the degree of legal enforceability in this way cannot only be defended from the point of view of practical experience, but also from the point of view of the principles of international law. One of the requirements in Article 2 of the Vienna Convention on the Law of Treaties stipulates that for an agreement to be regarded as a treaty it needs to be 'governed

[117] Ahearn, 'Europe's Preferential Trade Agreements: Status, Content, and Implications' (n 89), p. VI. Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (n 36).

[118] European Commission, Communication on Europe 2020 strategy (n 59), pp. 22-34.

by international law'. This is normally interpreted to require the parties to intend that the agreement has legal effect under international law. The terminology of an agreement may indicate the extent to which such intent exists.

3 Research Orientation

The research will examine whether the NGFTAs are compatible with fundamental law principles of the EU law, such as the principles of conferral, limited competences, and autonomy. This is in order to determine the implications these new instruments may have on the EU as a global actor. The research is framed by the purpose (Section 3.1), and explicitly determined by the research question (Section 3.2).

3.1 Purpose of the Research

The 'New Generation' FTAs seek to provide a deeper liberalisation that go beyond WTO's commitments. This may lead to consequences on both the EU's internal and international levels. This type of agreements is rapidly evolving, increasingly demanding deeper integration, and providing a changing landscape in regard to policy. They can be considered as a change in the paradigm of the definition of FTAs.[119] This thesis is intended to elaborate on the framework encompassing principles and competences that establish the New Generation FTAs as a new legal instrument.

The Lisbon Treaty provided the EU with a stronger position in respect to international trade. The CCP now covers services and commercial aspects of intellectual property and allows for a more comprehensive approach to trade and investment issues.[120] To reach effectiveness in the international trading system,[121] the purpose of the Lisbon Treaty was to have a single diplomatic presence for the EU, that can represent a single legal entity that is active globally.[122]

The EU is increasingly employing FTAs as tools for its internal market and external relation policy.[123] The EU is using the New Generation of FTAs as tools in order to pursue

[119] Richard Baldwin, Simon Evenett and Patrick Low, 'Beyond Tariffs: Multilateralizing Non-tariff RTA Commitments' in Richard Baldwin and Patrick Low (eds), *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge University Press 2009).

[120] From an institutional perspective Lisbon Treaty also strengthened the role of the European Parliament in relation to trade related matters. The institutional perspectives will be further discussed in Chapter II.

[121] Antonio Missiroli, 'The New EU "Foreign Policy"' System after Lisbon: A Work in Progress' (2010) 15 European Foreign Affairs Review 427, p. 447.

[122] Ramses A Wessel and Bart van Vooren, 'The EEAS's Diplomatic Dreams and the Reality of European and International Law' (2013) 20 Journal of European Public Policy 1350, p. 1352.

[123] Arnaud van Waeyenberge and Peter Pecho, 'Free Trade Agreements after the Treaty of Lisbon in the Light of the Case Law of the Court of Justice of the European Union' (2014) 20 European Law Journal 749, p. 750.

bilateral commitments with strategic partners.[124] These agreements aim to achieve liberalisation of trade and investment. Trade and investment are large concepts providing a wide range of subjects within an agreement.[125] Due to this wide subject range, New Generation FTAs cannot be considered homogeneous agreements, which in turn, makes the determination of the competence question more intriguing.

The CCP and the structure of the EU's multilevel governance are a constantly evolving system. With the new issues within such non-homogeneous agreements, the question is therefore how far the CCP can be extended. With this in mind, this thesis will consider bilateral trade through FTAs in the context of a broader international legal framework. Particularly, it will elaborate on the framework of the NGFTAs as a new legal instrument with the ambition to provide further guidance in the interpretation. In order to do so, the interaction between the various competences of NGFTAs will be discussed with an attempt to establish the limits of these competences, from both, an EU and international points of view.

The New Generation FTAs are assumed to require further integration. In order to achieve such integration, the EU needs to better accommodate the differences among the different international, European and Member States' levels.

Since the role of the EU autonomy is to safeguard the EU's prerogatives, this type of agreements makes it essential to find the appropriate balance between further liberalisation of free trade and the EU's attempt to maintain its autonomous legal order. For this reason, it seems appropriate to analyse the NGFTAs as a new legal instrument for the EU's external action in relation to the EU's competence, and also its autonomy, specifically in regard to the dispute settlement mechanism.

3.2 Research Question

What is the significance and implications of the bilateral 'New Generation' of Free Trade Agreements as a new legal instrument for external action and trade of the European Union?

In order to answer this question, the following two sub-questions are employed as viewpoints, and are intended to provide guidance for the interpretation of the 'New Generation' FTAs as new legal instruments:

1. *What are the limits of the attributed competences in relation to the wide subject range of NGFTAs after the reformed CCP in the Lisbon Treaty?*
2. *How do the reformed ISDS mechanisms within the NGFTAs affect the autonomy of the EU?*

[124] Marc Bungenberg, 'Going Global? The EU Common Commercial Policy after Lisbon' in Cristoph Herrmann and Jörg Philip Terhechte (eds), *European Yearbook of International Economic Law*, vol 1 (Springer 2010) p. 126.

[125] This subject range will be of the NGFTA will be discussed throughout the research as examples from the agreements.

4 Methodology

The NGFTAs need to be viewed in a broader context through a theoretical framework, to be able to evaluate their function as 'new legal instruments' of the EU's external action. Consequently, to analyse the significance and potential implications of these external trade instruments for the EU, it is necessary to consider the division of competences, the adoption of the new legal instruments, i.e. the ratification of agreements, and the EU's adequate protection of its autonomy. This will be accomplished by establishing the approach within a theoretical framework through which the research will be conducted.

4.1 Research Approach

This type of bilateral trade agreements has been able to coexist with GATT / WTO. In the field of international economic law, the legalization of international economic relations and the judicialization of dispute settlement can be best illustrated through the transformation of the GATT to the WTO in 1995. This transformation led to a major juridification of an international trade regime.[126]

After the change in policy, the NGFTAs intended to achieve new trade relation with the adoption and application of measures designed to achieve valuable goals. The NGFTAs now provide a new forum for a high level of trade liberalisation that contributes to achieving a better allocation of resources, economic prosperity, and a raise in the standards of living.[127] The intertwined web of legal obligations for foreign investors has always provided a difficult navigation for foreign investors, with these NGFTAs the foreign investors will easier be able to challenge the actions of host states in a dispute settlement system included in the NGFTAs. This means that the international investment regime moved towards a model where the dispute settlement will rather be resolved according to rules, in different from a former highly politicized international investment dispute.[128]

This type of agreement is focused solely on investment but contains a very large scope of an international liberalisation trade regime. The question arises not in relation to the possibility to coexist but rather in relation to the scope of the agreements *per se* since the NGFTAs result in a wide and deeper effects for both the EU and international trade.

Although trade liberalisation is in the core of the EU's external trade agenda, there is a need for a balance between such objectives and the protection fundamental principles such as

[126] Andrew Lang, 'Rule of Law in International Economic Relations' in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (The Lypiatts 2017), pp. 15-16.

[127] Donald Regan, 'What Are Trade Agreements For? Two Conflicting Stories Told by Economists, with a Lesson for Lawyers' (2006) 9 Journal of International Economic Law.

[128] Lang, 'Rule of Law in International Economic Relations' (n 126), pp. 15-16.

autonomy, constitutionalism and the preservation of internal division of power. Finding such balance becomes more difficult in situations, where the trade agreements in question contain rules that may result in obstacles to trade, such as rules in relation to valuable goals, health protection, environment, human rights, etc.[129]

The NGFTAs are trade instruments that provide both liberalisation and regulatory protection at the same time. In order to thoroughly study this type of agreements as a new legal instrument and reach the above-mentioned balance, it is important to regard the agreements in a theoretical context so that it becomes possible to see the broader structure.

4.1.1 Multi-Level Theoretical Framework

While researching areas directly affected by a multi-layered system between the EU, its Member States and international public law, it is necessary to consider the EU targeted as cosmopolitan constitutionalism, aimed through integration between its Member States to protect and emancipate citizens *vis-à-vis* abuses of national foreign policy powers. This is then based on a *multi-level constitutionalism* constituting, limiting, regulating, and justifying multi-level governance of transnational public goods. These common markets, transnational rule of law, and multi-level legal and judicial protection of cosmopolitan rights can have far-reaching repercussions on international economic law, which has been illustrated by the European constitutional and common market law and EU membership in worldwide organizations such as the WTO.[130]

It seems appropriate to start the theoretical discussion from the constitutional base of the EU, establishing that the EU is '(…) founded on the value of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (Article 2 TEU).[131]

There are provisions in the EU treaties confirming the EU's multi-level constitutionalism and institutional 'checks and balances'. Firstly, this can be considered through the democratic principles on conferral of limited EU powers and them being subject to constitutional restrains. The constitutional restrains come in forms of conferral, subsidiarity, proportionality and rule of law and are set out in Articles 2 and 5 TEU.

In the EU, the citizens, both individually and collectively, are the democratic sovereigns in EU law. This means that the democratic legitimacy of the EU institutions derives from the protection of fundamental rights democracy, and the rule of law which are considered as the

[129] Tamara Perišin, *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO* (T.M.C. Asser Press 2008).

[130] Petersmann, 'Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations' (n 13), p. 23.

[131] Similar provisions can be found in the European convention for the protection of Human Right (ECHR) and, to a lesser extent the European Economic Area (EEA).

'democratic trias' governing EU Member States. There are also other sources such as the transnational public goods which due to a more extended globalization or more at risk and can no longer be protected unilaterally without international law and multilevel governance institutions.[132]

The NGFTAs, is a new dimension affecting the same issue. This is specifically so due to the extensive and deep integration constituting, limiting but also adjudicating through investment arbitration on the international arena. In this regard the common commercial policy of the EU is the focus in the EU external relation.

The approach to be taken when approaching a multilevel system according to Petersmann,[133] should be to systematically address the external interference provided as the new legal instrument of the EU external action and its interdependent task between affecting all the different layers: international, EU and Member States competences.[134] He proposes therefore that such an instrument needs to be viewed from a more structural categorization through (1) rule making, (2) rule clarification, (3) prevention and settlement of disputes, and (4) rule-enforcement by national and international courts based on international agreements accepted by the EU and its Member States, since international agreements provide an '(...) integrating part of the Community legal system (...)'.[135]

The research will therefore be conducted in a way to address these structural categorizations in a step-by step analyzation. It considers rulemaking in the sense of the continuously changing CCPs and the NGFTA in terms of rulemaking. 'Rule clarification' is considered in relation to questions of competence of this type of agreements, where the purpose is to see and understand the exact limits within the different competences. 'Prevention and settlement of disputes' is considered in relation to the investment court system within the NGFTAs. 'Rule-enforcement' is considered in relation to the possibility of the EU to enforce disputes from the Investment court system in relation to both national and international law.

The NGFTAs as a new legal instrument cannot only be considered through a structural categorization but should be equally considered through a theoretical understanding of the EU's external action and the CCP. Considering these two approaches it helps find the balance

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[132] Petersmann, 'Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations' (n 13), p. 37.

[133] Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (Bloomsbury Hart Publishing 2017).

[134] Arthur Benz and Christina Zimmer, 'The EU's competences: The 'vertical' perspective on the multilevel system' (2010) 5 Living Reviews in European Governance 1, p. 18.

[135] Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (n 133).

between an adequate protection of the EU's autonomy in external trade and its aspiration of a more free and liberalised trade agenda.

4.1.2 Balancing between Free Trade and Adequate Protection

The utilitarian perspective takes the approach that liberalizing trade is a good policy. It is considered this way simply because the majority benefits from it. The consumers receive more choices, and there would be lower prices; it creates more jobs. In other words, a positive-sum game with the greatest good for the greatest number. However, to only focus on utilitarianism would not lead to a good trading environment. In fact, the utilitarianism may ignore individual rights. NAFTA and GATT were considered to be flawed in this regard because the trade policy was implemented to benefit the majority, or that benefits consumers, or that it is in the public interest. But a proper position to take is that a trade policy should be implemented or adopted if it does not violate anyone's right.

This is the approach to be applied in this thesis where the EU, with its Member States, is considered as one party and the third party on the other end of the bilateral free trade agreement. The idea is that the free trade zone shall in fact reach a balance between free trade and protectionism in terms of the EU's way of protecting its prerogatives through its restrictive interpretation of Autonomy. The point is not that one of the parties should lose but rather to have a similar gain, where the autonomy of the EU should not be at risk.[136]

It is important to find an adequate protection for the 'rule of law' (Article 2 TEU) and 'strict observance of international law' (Article 3 TEU) in order not to undermine the legitimacy of the EU, and the welfare of its citizens.[137] This is an important area to consider since international dispute settlement bodies' jurisprudence tends to be more developed, and more frequently invoked than other areas in EU's international relations.

The Lisbon Treaty acknowledged this challenge by explicitly enshrining the aim to ensure consistency between all areas of the EU's external actions, and between them and its other policies in several treaty articles, including Article 21(3) TEU.[138] Apart from this, there are the two general principles of the EU, which work towards the unity and effectiveness of the EU's external representation: the principle of loyal or sincere cooperation enshrined in Article 4(3) TEU, and the principle of consistency in Article 13(1) TEU and Article 7 TFEU.

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[136] Robert W. McGee, 'The Fatal Flaw in NAFTA, GATT and All Other Trade Agreements' (1994) 14 Northwestern Journal of International Law & Business , p. 560.

[137] This was a raised issue in relation to the compliance with the budget and debt disciplines prescribed pursuant to Article 126 TFEU) inside the Eurozone, and the proposals by France and Germany at the EU Council meeting in December 2011. In this regard a stronger compliance was advocated to increase judicial supervision of compliance with the EU budget and debt disciplines.

[138] Gstöhl, Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (n 12), p. 736.

The questions raised by this type of agreements clearly point to the fundamental issue in the EU legal order on the interaction between the Member States and the EU together with its institutions in practice. Most of these agreements, as will be further analysed, are made as mixed agreements. However, in relation to the effectiveness of the EU's representation at the international level, it is not always convincing, taking all the required work to accommodate all Member States in both negotiation and ratification.

This debate clearly furthers this conversation to what one could consider the focus on the driving force in EU external relation i.e. the common commercial policy of the EU. There have been never-ending discussions of how to interpret the CCP. The Commission is representing more of a supranational approach, which strives towards a larger scope of the CCP. The Council represents a more internal governmentalism with the attempts to keep the CCP narrow. The Council considers that international trade agreements should be based on shared competence to a larger extent. Opinion 1/94 functioned as an attempt to confront the on-going discussions; however, the CJEU treated the CCP as 'an open-ended and evolutionary concept'.[139] The CCP operates in a more global context where its internal provisions is dependent on the international trade development. This clearly indicates that in order to be able to grasp the CCP and the NGFTAs as a new legal instrument for the EU's external action, it is necessary to have a broader mind-set to consider the multi-level governance at the national, EU, and international levels. It also means that the multilevel governance should be viewed as the core and backbone to the theoretical base of the EU. The fact that the EU law should apply as a final authority is accepted and provides a constitutional limit in a legitimatized hierarchy.[140]

The EU should, as already implied by the *Van Gend* and *Costa*, maintain its legal order independently from external legal processes, which, in that sense, include both domestic, i.e. Member States' domestic legislations, and international law. It has become '(…) increasingly artificial to describe the legal structure and processes of the Community with the vocabulary of international law (…)'.[141]

Maintaining such legal order provides complications in relation to the balance between the free trade within the NGFTAs and an adequate protection of the EU's autonomy.

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[139] Francis G Jacobs, 'The Completion of the Internal Market v the Incomplete Common Commercial Policy' in Stratos V Konstadinidis (ed), *The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market* (Aldershot 1996), p. 3.

[140] Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' (2008) No. 111 Working Paper: University of Michigan Public Law.

[141] Joseph Weiler and Ulrich Haltern, 'The Autonomy of the Community Legal Order-Through the Looking Glass' (1996) 37 Harvard International Law Journal.

There have been attempts to increase the scope of judicial review inside the EU through the Lisbon Treaty;[142] and it remains important to consider the refusal by the EU's institutions of judicial remedies against their violation, and the EU's international treaty obligations under the WTO law, and the NGFTAs.[143]

Some scholars simply denied the existence of a basic norm, or a rule of recognition and some type of a merger of public resources in international law. That is, the rules of international law do not constitute a single system. 'International law simply consists of a set of separate primary rules of obligation which are not united in this manner'.[144] The CJEU instead reasoned that '(...) by contrast with ordinary international treaties the EEC Treaty has created its own legal system'.[145] However, the more logical reasoning in relation to the EU would instead be that each treaty-system in fact constitutes a separate legal system, in which the agreed objectives and specific rules may essentially derogate from general international law.[146]

The EU is an existing legal system that has already established norms and principles. However, the Lisbon Treaty provided a new legal system that can be considered, when it comes to its legal instruments, as still developing. The Lisbon Treaty acquired a new form of system which in turn has been giving birth to new norms and policies in the EU. The new CCP gave birth to new understandings of the EU's external action, and free trade agreements.

The NGFTAs are new type of instruments that were generated from the change of policy. Therefore, these instruments need to be examined in light of competence and also in relation to the EU autonomy.

In order to view the distinctive character of the EU, it has to be viewed from both, its international identity and 'internal' constitutional system of relations between institutions. This model of integration operates at more than one level, and the different features providing the base of the CCP to conclude international agreements will be examined in the context of bilateral FTAs to reach for further liberalisation of trade. It is important to underline, in this regard, that effective judicial remedies for citizens in both domestic and international courts may be somewhat overlooked.

The EU's trade policy should therefore be guided by broader goals than simply the progressive abolition of restrictions on trade and investment. The EU aims at combining economic interests, political values, and other norms in its external relations, yet without

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[142] Alicia Hinarejos, *Judicial Control in the European Union, Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford University Press 2009).

[143] Wolfgang Wessels, 'An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes' (1997) 35 Journal of Common Market Studies 267, p. 274.

[144] Herbert Hart, *The Concept of Law* (Clarendon 1994), p. 233.

[145] C-6/64, Costa v. E.N.E.L. (n 28).

[146] Ramses Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5 European Foreign Affairs Review , p. 508.

indicating any prioritisation among these objectives. This new constitutional framework for the EU's external action creates the legal foundation for coordinating the CCP with other external policies and pursuing non-trade objectives through trade. It may also lead to tensions and problems of policy coherence, not the least as this 'normative' amendment of EU's primary law coincides with a shift in EU's trade policy towards more offensive commercial concerns.

The New Generation of FTAs can, in this regard, be defined as a commitment of the signatory parties to remove trade barriers that may exist between them.[147] It can also be considered to provide a new institutional framework that establishes the base to include a wide variety of regulatory cooperation within the agreements. This is accomplished through increasingly contemplating regulatory cooperation within the NGFTAs. The rational for promoting regulatory cooperation through these agreements is to be able to work together in order to develop rules that implicate areas of domestic regulatory policy. This is usually the situation in cases where the subjects of international regulatory cooperation have been too difficult to be successfully addressed through a multilateral trade agenda.

Furthermore, the NGFTAs have also legal effects, such as the provisional application, and the potential conflict with the autonomy of the EU's legal order. The balance between liberalisation of trade and adequate protection of the EU clearly shows a more complex interaction through utilitarian concepts of economic justice where the terms of consumer welfare and reduction of poverty. This should be based on constitutional democracies and the Lisbon Treaty justifying law and governance in terms of equal constitutional and cosmopolitan rights though human rights, 'constituent powers', and 'democratic principals', delegating only limited governance powers to national governments and EU institutions; democratic governance, rule of law, and other 'secondary constitutional principles' derive from the human and constitutional rights mutually recognized among citizens in their 'social contracts'.[148]

4.2 Methods

The EU's external relations law is built to govern its interaction with the world through rules governing the division of competence, the adoption of the instrument, and principles that may affect or be affected by the NGFTAs.[149] This idea has helped to outline the structure of the thesis. Firstly, through rules governing the division of competences between the EU's institutions and Member States; in other words, the competence to establish what policy to be

[147] Nugent, *The Government and Politics of the European Union* (n 61), pp. 372-376.

[148] Petersmann, 'Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations' (n 13), p. 37.

[149] Bart van Vooren and Ramses A Wessel, *EU External Relations Law Text, Cases and Materials* (Cambridge University Press 2014).

taken on which level. Secondly, in regard to the rules governing which instruments the EU may adopt through its conferred competences. Thirdly, in relation to the governing principles, which may have legal effect on these instruments in the EU, and also internationally;[150] in other words, the autonomy principle.

When considering the policy shift, the agreements will function to exemplify issues in relation to competence apparent in the agreements, and also the ISDS mechanism, and how it corresponds to the EU and the CJEU.

The research will be conducted from a problem-oriented view in order to describe the origin, content, rationalization, and potential consequences of the NGFTAs as a new legal instrument. The EU's free trade agreements are built on the WTO as the platform or starting point of trade. The balance is between a rule-based or liberalizing approach. This is specifically in regard to the fact that the EU's role, as a rule generator in external relations, is underpinned by the internal development. The EU's approach is, in this respect, dynamic with new methods of integration and multileveled governance, closely linked to a constantly evolving constitutionalism.[151]

4.2.1 The Legal Dogmatic Method

The legal dogmatic method[152] refers to studies concerning what is a valid law as well as why different elements of such law interact with one another. This approach applies to the former discussions concerning the EU as a multi-layered legal order.

For the purpose of this thesis, the dogmatic method to be used can best be described by Bulygin. The first sub-group refers to where it is necessary to identify the legal norms, where the meaning of the formulation of the norms, which occurs in the legal text, should be analysed. The second sub-group should refer to a systematisation of legal norms, which can be made through analysis of case-law. The third sub-group refers to questioning, modifying, or transforming the legal system.[153] This will be consequently used in each chapter.

The on-going development of EU law should be considered in a more interactive multi-layered legal order with a plurality of legal sources, including EU law constitutional considerations, internal market provisions, competences, bilateral agreements, and to a certain extent, public international law. Analysis of statutes, rulings by courts and authorities, policy

[150] Ibid.

[151] Mark van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Dicipline?', *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline* (Hart Publishing 2013), p. 108.

[152] For this purpose 'legal dogmatics' or 'dogmatic studies of law' or 'doctrinal legal research' are considered synonyms.

[153] Eugenio Bulygin, 'Legal Dogmatics and the Systematization of the Law' in Eugenio Bulygin and others (eds), *Essays in Legal Philosophy* (Oxford University Press 2015), p. 221.

statements and doctrine serve the practical purpose of displaying and giving content to the legal rules. Additionally, on a more theoretical level, it should also be possible to systematise the legal material and give a base for further developing legal concepts and doctrines.

The two interesting points to show with this research are the scope of competence in relation to NGFTA, and the autonomy of the EU law in relation to dispute settlement and ISDS. In this regard, the overarching ambition is to provide further guidance in the interpretation of 'New Generation' FTAs. Analysis of EU law and the NGFTAs, rulings by courts and authorities, as well as policy statements and doctrine serve the practical purpose of displaying and giving content to the legal rules. Additionally, this work may give rise to a systematisation of the legal concepts and doctrines for the NGFTAs as legal instruments of the EU.

The changes in policy starting from 2006, together with the entry into force of the Lisbon Treaty in 2009 provided for the FTAs as a new legal instrument. The policy changes will be viewed in relation to the attribution of competence and the wide subject range of the agreements, on the one hand, and the relation between the EU autonomy and investment arbitration tribunals on the other hand. During the course of this thesis, clarity was provided by the CJEU in relation to the post-Lisbon CCP, and the exercise of EU's trade and investment policy more generally through its Opinion 2/15. The legal issues in relation to the nature of the new ICS in the agreements have also been brought up to the CJEU for clarification, although Opinion 1/17 has not yet been delivered.

Naturally, the choice of subject for this thesis has proven to be very dynamic, where many changes have been provided throughout the course of writing. At the beginning, there were few written materials in relation to this type of trade agreements, but this has been dramatically changed with the many contradicting opinions surrounding the TTIP. The dynamic nature of the agreements provided the necessity for a flexible approach to the subject. In terms of the availability of materials, such as articles and doctrines, it has gradually changed from almost nothing to so overwhelming in extremely short period of time. The legal materials available at different stages have been analysed and systematized.

4.2.2 Classification of NGFTAs

As a first consideration, the NGFTAs are considered to be bilateral comprehensive agreements because of their wide scope.[154] The objectives are in general similar for this type of agreements. The NGFTAs considered for this research have trade and investment agreement as

[154] Woolcock, 'European Union Policy on Free Trade Agreements' (n 14), p. 2.

their primary objective. They are motivated through neutralizing trade diversion resulting from FTAs between third countries, forging strategic links with countries or regions experiencing rapid economic growth or enforcement of international trade rules.

There is no standard form of EU's international agreements. Even though all trade agreements contain trade components, the objective of trade provisions as well as indication of the level of trade liberalisation that the agreement envisages may differ among the different agreements. However, all the selected agreements differ from former FTAs. This type of agreement can be considered to have more of a commercial objective. The ultimate aim of the agreements should be to neutralize potential discrimination against the EU's exports and investments through free trade.

Determining which agreements to consider for this thesis has its starting point from the idea of Ahearn's categorisation of EU's trade related agreements,[155] and are thereafter considered to go further than the already established categorisation of WTO-plus and WTO-extra, which makes them fall into a new group named WTO-beyond. These agreements are specifically important because of the use of international standards in areas of deeper integration in order to ensure that the developed rules in major markets are consistent with the European standards. When it comes to international trade, the growing emphasis on the EU's competitiveness may create tensions in regard to certain constitutional aspects.[156] Moreover, together with the trade aspects of the agreements, special attention has been dedicated to the investment issues and in particular the new ICS. The ICS does not function as a common denominator in the classification processes, since the ICS was introduced much later in the process of the thesis. Denominator is the overall objective of deeper integration underpinning these types of agreements.

Moreover, the agreements chosen for this research should be bilateral in nature and are geographically distant trading parties to the EU. It means that close cooperation agreements, such as with Turkey, will therefore be excluded from this research.

The agreements listed for this thesis as the NGFTAs are firstly EU-South Korea, KOREU, which is an important agreement to consider due to the fact that it was concluded right after the EU's switch in policy and could be considered as the gold standard of the NGFTAs, where further development has built in in the later agreements. The EU KOREA though still has a comprehensive depth to its provisions where it established a free trade area on goods, services, and establishment, with the objective to facilitate trade in services and investment between the

[155] Ahearn, 'Europe's Preferential Trade Agreements: Status, Content, and Implications' (n 89), p. 3.

[156] Gstöhl, Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (n 12), p. 735.

parties and promote FDI without lowering or reducing environmental, labour or occupational health and safety.[157]

In the CETA agreement objectives can be found in the preamble of the agreement. It clearly states that it is within the parties' intention to create, expand and secure market for their goods and services through the reduction or elimination of barriers to trade and investment based on clear and transparent rules governing their trade and investment. It, moreover, recognizes that the provision of the agreement protects investments and investors with respect to their investment and are intended to mutually benefit the business of the parties. It furthermore reaffirms that their commitment to promote sustainable development and the development of international trade in a way to contribute to sustainable development in its economic, social and environmental dimensions.[158]

The objective of the Singapore agreement is to liberalise and facilitate trade and investment between the parties in accordance with the provisions of the agreement.[159] The EU Singapore agreement makes clear that the parties are determined to strengthen their economic, trade and investment relations in accordance with the objective of sustainable development, in its economy, social and environmental dimensions, and to promote trade. The parties are also determined to promote trade and investment in a manner mindful of high level of environmental and labour protection and relevant standards.[160]

The objective of the EU Japan agreement is to liberalize and facilitate trade and investment, but also to promote a closer economic relation s between the parties.[161] The parties are then determined to establish a legal framework in order to strengthen their economic partnership. However, the parties recognize that it should be done in accordance with the objective of sustainable development in the economic social and environmental dimensions. And while promoting trade and investment they need to be mindful to ensure the high level of environmental labour protection through relevant international standards.[162]

Similarly, the EU Vietnam objective is to liberalize and facilitate trade and investment between the parties.[163] The parties are then determined to strengthen their economic trade and investment relationship in accordance with the objective of sustainable development, in its

[157] EU-Korea agreement, Chapter 1 Article 1.1

[158] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Preamble.

[159] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Article 1.2 Objectives.

[160] Ibid., Preamble.

[161] Agreement between the European Union and Japan for an Economic Partnership, Chapter 1 General Provisions Article 1.1 Objectives.

[162] Ibid., Preamble.

[163] 'EU-Vietnam Free Trade Agreement: Agreed text as of January 2016', Chapter One Objectives and General Definitions, Article 1.2.

economic, social and environmental dimensions. The parties are further determined to promote trade and investment under this agreement in a manner mindful of high levels of environmental and labour protection and standards.[164]

The EU-US FTA (TTIP) is the largest bilateral trade initiative ever negotiated; however, it was indefinitely halted in 2016. It is significant in its potential global reach in setting an example for future partners and agreements.

4.3 Delimitation

By defining the boundaries of this research, it is important to state that the research will focus on the 'New Generation' of FTAs as a new legal instrument of the EU's external trade.

The NGFTAs considered for this research have trade and investment agreement as their primary objective, where trade relates to on export and investment leads to naturally exclude other types of agreements, trade agreements in relation to integration, cooperation, and trade with less developed countries.[165] This also means that association agreements which have different objectives and where the focus is not on trade and investment but rather on promoting gradual rapprochement between the parties based on common values and close and privileged links and provide frameworks for enhanced political dialogue in all areas of mutual interest, fall outside of the scope of this research.[166]

This type of agreements break ground into new areas, such as labour standards, environment and competition policy.[167] Within the scope of this thesis, such specific areas will not be thoroughly dealt with, but rather analysed in their context. This applies also to other areas, such as public procurement and environmental protection. These areas do not particularly help answering the research question, and are therefore excluded, even if they could be seen as affected by the NGFTAs.

The focus being on the new legal instrument will therefore put the focus on the potential risks and outcomes from the agreements as a new legal instrument, which means that they will not be examined in a purely comparative manner but instead analysed in relation to their

[164] Ibid., Preamble.

[165] There are four groups in total. The first three refer to other kind of trade agreements, which makes the forth group the relevant one. The first group relates to agreements designed to prepare for countries accession to the EU. It could also be geographically close relations to the EU. It can be described as agreements with the ultimate goal of integration. The second group relate to the improved security and stability to the EU's surrounding areas. These agreements are less integrationist than group one. Examples to this type of agreements could be the Euro-Med agreements and the EU-Russia Cooperation agreement. In the third group, the agreement has rather been designed to focus on countries which are less developed. An example could be the ACP agreements.

[166] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161, Article 1.2.

[167] Horn, Mavroidis, Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (n 68), p. 43.

definition. In other words, the chosen agreements, which are examples of NGFTAs, will be used in order to demonstrate the function of the instrument.

The balance between the obligation to comply with international law and the autonomy of the EU legal order is in the heart of the constitutional construction of the EU. The concept of autonomy used for the purpose of this thesis, will therefore refer to the principle of autonomy of the EU legal order, and specifically in relation to the EU's external relations. This clearly excludes any definition of autonomy used in international law, such as institutional autonomy, which refers to the relationship between an international organization and public international law more generally.[168] Moreover, it should not be confused with territorial integrity or sovereignty, which is discussed in international law. Territorial integrity is an international law principle, which was meant to broaden the protection against the use of force by more powerful states. The protection of the territory is an expression of the sovereign equality of all states, no matter how powerful they are.[169]

The main perspective in the analysis and discussions will surround the effect this type of agreements, as legal instruments, may have on the EU. For this reason, the main focus is the EU. In EU law, it is possible to point out that Member States' national sovereignty is embodied in the principle of conferral, even though the principle of primacy, direct effect and effectiveness of EU law are also important factors in this regard.[170] However, this thesis is not intended to address problems related to the different ways in which the EU differs from the domestic legal systems.

International legal perspectives will be taken into consideration and discussed for the purpose of reaching the larger goal in answering the research question. These include international public law, investment law and international economic law with international principles. The same applies to cases from the WTO or other dispute settlement bodies; they will be used as examples but will not be the main focus.

Concerning individual Member States and national legislations, the thesis will not go into details. The discussions on bilateral investment treaties (BITs) will stay on a policy level without entering into the level of individual Member States.

Viewing the NGFTAs as trade instruments for the EU also requires the study of their main functions. Technically, these agreements are legal instruments of the EU's external trade.

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[168] Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (n 36), p. 4.

[169] Christian Marxsen, 'Territorial Integrity in International Law – Its Concept and Implications for Crimea' (2015) 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht , p. 9.

[170] Eleftheria Neframi, 'Within the Scope of European Union Law: Beyond the Principle of Conferral?' in Johan van der Walt, Gous Willem and Jeffrey Ellsworth (eds), *Constitutional Sovereignty and Social Solidarity in Europe* (Nomos/Bloomsbury 2015), p. 70.

In this thesis, the NGFTAs are used as the sole example, since they are the only agreements concerning free trade and investment with international parties.

The NGFTAs are bilateral in nature and provide elimination of trade barriers between countries. They promote free trade that is concentrated and, more importantly, also limited to the trading blocks, which are parts of the agreement.

5 Disposition

Chapter I, being the introductory chapter, did not only establish the background to the subject, but also the framework, through which the research will be conducted. The main research question and the delimitation further provided the structured frame for the research. The methodology section determined the theoretical backbone and explained the method on which the research will be based.

Chapter II provides overview of the legal framework for the EU to conclude the NGFTAs. This chapter examines the rules governing the adoption of NGFTAs as legal instruments. It will address the negotiation and conclusion of the agreements in regard to the ratification, provisional application and implementation.

Chapter III explains the objectives for the NGFTAs as new legal trade policy instruments in relation to the EU's competence. It furthermore analyses the limits of implied exclusive competence and shared competence. It examines the research sub-question 1 on the attributed competence and its limits, and also the different areas of competence applicable to NGFTAs.

Chapter IV examines the rules governing the adoption of the NGFTAs as mixed agreements. It discusses the implication of concluding the NGFTAs as mixed agreements; this way, it addresses the link between the main research question and the first sub research question.

Chapter V examines research sub-question 2 on how the dispute settlement mechanisms within the NGFTAs for investments and investor-States affect the autonomy of EU law, which corresponds to the third categorisation of the methodology. It is intended to clarify the balance between the autonomy of the EU legal order on the one hand, and the investment protection provisions included in the NGFTAs on the other hand. The interaction between the EU legal order's autonomy and international dispute settlement is of particular interest, especially in order to clearly determine the ISDS, and institutional difficulties of the NGFTAs.

Chapter VI concludes the discussions surrounding the significance of the NGFTAs as a new legal instrument, and the implication it may have on the EU's external action. The chapter serves as an analytical discussion binding the previous parts of the thesis together. Furthermore,

it will suggest potential modifications and clarifications of the instruments and present areas, which will open the door for further future research on the NGFTAs.

CHAPTER II
THE NGFTAS AS EU AGREEMENTS

This chapter is intended to provide a broader presentation of the New Generation Free Trade Agreements (NGFTAs), which are selected for this thesis. The agreements will be more generally presented in terms of negotiation and conclusion, objectives and dispute settlement procedure.

Thereafter, this chapter will address the legal and institutional framework, the procedure for negotiation, the ratification process and the surrounding circumstances for provisional application of trade agreement. Subsequently this chapter will further address the institutional requirement for implementation. The ratification process, and its surrounding issues will be discussed together with the possibility to provisionally apply the agreements.

Additionally, the implementation of agreements, and the role of the European Parliament and Council will be explained. Thereafter, the possibility to renegotiate and make amendments to the agreements will be discussed.

1 An Overview of the NGTAs

The recent developments in the EU's external action have led to the NGFTAs. Since the Lisbon Treaty, these agreements could be considered to complete the picture of the EU's new trade policy and objectives. In order to be able to further analyse the legal and institutional framework it is important to first of all present the six different agreements which will serve as examples but also a base for further analytical discussion in this thesis. These agreements are of particular interest due to their new ambitious model with deeper integration.[171]

1.1 EU–Korea FTA (KOREU)

The EU–Korea FTA (KOREU), which was signed on 6 October 2010, was the first agreement to be accomplished after the shift in the EU's policy. For this reason, it is considered to be the gold-standard for the 'New Generation' of FTAs.[172]

The NGFTAs extend the rule of law by including issues, such as competition and investment, which were not considered by the WTO due to the lack of consensus between the

[171] European Commission, 'Communication from the Commission to the European Parliament, the Council, the Europeand Economic and Social Committee and the Committee of the Regions. A Balanced and Progressive Trade Policy to Harness Globalisation, (Communication on a Balanced and Progressive Trade Policy to Harness Globalisation)' COM (2017) 492 final.

[172] European Commission DGTrade 'The EU-Korea Free Trade Agreement in Practice' (n 16), p. 3.

parties.[173] In this regard, one can consider that the KOREU was '(...) testing ground for new multilateral trade policy disciplines and regulations (...).[174]

The FTAs indicate general commitments where the parties are obliged to remove barriers to trade in goods and services. The KOREU includes the removal of tariffs and substantial market access commitments for a broad range of service sectors.[175] It also contains further trade liberalisation with provisions that go beyond existing multilateral rules or the so-called WTO-plus provisions.

The collaboration between the EU and South Korea had been established long before the KOREU's negotiations started. The two parties were already engaged in a framework agreement on trade and cooperation.[176] Hence, the KOREU is considered as a natural progression.[177] The agreement was implemented after a relatively rapid negotiation. The swift process could have been a result of the already established close trade relations.[178]

The KOREU contains a general dispute settlement mechanism provided in Chapter 14. It also includes some sector-specific dispute settlement rules that are provided in each relevant Chapter.[179] The KOREU dispute settlement procedure can be considered to be evolved from the WTO dispute settlement procedure.[180] The dispute settlement mechanism includes consultation, establishment of a panel, submission of report by the panel, and the implementation of the latter report as basic procedures.[181]

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[173] Der-Chin Horng, 'Reshaping the EU's FTA Policy in a Globalizing Economy: The Case of the EU-Korea FTA' (2012) 46 Journal of World Trade 301, pp. 315-317. He suggests that: "The WTO-plus sectors must be deemed necessary if the EU's [Common Commercial Policy] and foreign policy are to be lawfully pursued. From a jurisprudence angle, the failure to adopt these sectors in the new generation FTA would compromise the legality of EU actions because compliance with the specific objectives of Articles 3 and 207 TFEU and Article 21 TEU would no longer be guaranteed", ibid, p. 315.

[174] Ibid, p. 322.

[175] Harrison, 'Overview of the EU-Korea Free Trade Agreement', p. 59.

[176] Framework Agreement Between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part [2010] OJ L 127/6, p. 4. Article 2(1)(a). The framework agreement was concluded between EU and Korea in 1996. The framework agreement makes reference to an increased bilateral cooperation, and hints to the possibility of negotiating closer economic ties between the parties in the future.

[177] Framework Agreement for Trade and Cooperation between the European Community and its Member States on the one hand and the Republic of Korea on the other hand OJ L 90/46.

[178] In 2011, the EU exported goods worth 32.4 billion Euro and services worth 7.5 billion Euro to Korea. The EU is also the second largest source of imports to Korea only after China. For its part, Korea exported goods worth 36.1 billion and services worth 4.5 billion to the EU making Korea the tenth largest trading partner of the EU.

[179] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter 14.

[180] Hee-Sang Kim, 'Dispute Settlement Mechanism of the Korea-EU FTA' (2010) 1 Yonsei Law Journal , p. 227.

[181] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/6, Article 7.45.

One specific aspect of particular interest in the KOREU dispute settlement procedure is the 'two-stage' process:[182] first consultation,[183] and then setting up a panel of experts.[184] The EU-South Korea FTA introduced the innovation of this two-stage process.

1.2 Comprehensive Economic and Trade Agreement (CETA)

The EU–Canada Comprehensive Economic and Trade Agreement (CETA) is one of the first signed comprehensive trade agreements. The negotiation between the EU and Canada ended on 26 September 2014.

In September 2014, the provisional text was officially published; and in February 2016, after certain modifications, the finalized text was published.[185] The agreement was thereafter signed in October 2016.[186] The final CETA comprises forty-two chapters, annexes, appendices, protocols, declarations, and understandings.[187]

The CETA has been provisionally applied since September 2017.[188] The provisional application means that certain provisions of the agreement will be applied before the ratification process by the Member States is completed.[189] However, the Investment Court System (ICS) will be excluded from the provisional application.[190]

The CETA aims at increasing bilateral trade and investment. Many of the provisions in the agreement are progressive and innovative. Moreover, the CETA is considered as a comprehensive agreement going beyond the WTO agreements. Nevertheless, it is compatible with the WTO. It makes cross-references to the WTO with respect to the GATT, and the General Agreement on Trade in Services (GATS).[191]

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[182] European Parliament 'Briefing paper: Trade and Sustainable Development Chapters in CETA' (n 43).

[183] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Articles 13, 14.

[184] Ibid, Articles 13, 15.

[185] One modification of the CETA texts worth mentioning is that the decisions by the CETA Joint Committee shall be binding on the parties only subject to the completion of any necessary internal requirements and procedures.

[186] European Commission 'EU-Canada summit: newly signed trade agreement sets high standards for global trade' 2016 <http://europa.eu/rapid/press-release_IP-16-3581_en.htm> accessed 15 July 2018.

[187] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[188] Council Decision 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/1080

[189] 'European Commission Fact Sheet: CETA - a trade deal that sets a new standard for global trade' 2016 <http://europa.eu/rapid/press-release_MEMO-16-3580_en.htm> accessed 12 February 2017.

[190] European Commission 'EU-Canada summit: newly signed trade agreement sets high standards for global trade' (n 186).

[191] An example to cross-references provided in the CETA agreement could be Article 1.4 in Chapter 1 of General Definitions and Initial Provisions in the CETA agreement where it provides the cross-reference to Article XXIV GATT and Article V GATS, which constitute the benchmarks that are relevant for determining whether a free trade area is in conformity with the GATT and GATS.

These types of cross-references are found in trade in goods and services, where the WTO principles[192] are incorporated in CETA's central provisions.[193] Moreover, in the CETA, the references or principles taken from the WTO discipline are sometimes further developed, rendered in a more precise and comprehensive manner, or simply going way beyond the WTO commitment through newly introduced trade rules.[194]

The CETA also includes investment protection rules that go beyond the WTO commitments.[195] Additionally, it contains commitments to treat investors fairly and equitably, provisions addressing 'treaty shopping', standards for protection of investors,[196] and rules on transparency state disputes.[197] There are also provisions to promote labour rights and environmental protection. Public health, safety, promotion and protection of cultural diversity are referred to in the preamble in order for the parties to keep its autonomy.[198]

The ISDS provisions are the most important provisions of the CETA, because they represent a new model for free trade, and more importantly, for NGFTAs.[199] In relation to the WTO-plus provisions, there can be a situation where the trade preference does not need to be extended because of its already existing reference in NGFTAs. This becomes more of a concern in relation to other forms of international economic integration that provide for regulatory cooperation. This is because such institutionalized mechanisms can come to affect future domestic regulatory initiatives, and in that way, also bilateral trade.

1.3 EU–Singapore FTA (EUSFTA)

The EU and Singapore commenced trade and investment negotiations in 2010. The finalised trade and investment agreements had been completed, and formally approved by the European Commission. At this stage, it needs to be agreed upon by the Council and the

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[192] World Trade Organization, Marrakesh Agreement Establishing the WTO, preamble, para. 1. "build on their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization …", ibid, Chapter 1, Article 1.5, where the parties 'affirm their rights and obligations with respect to each other under the WTO Agreement and other agreements to which the Parties are party'.

[193] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part chapter 2, WTO provisions on national treatment and import and export restrictions for goods.

[194] New trade-rules introduced by the CETA are those which go beyond the WTO such as for example the international maritime transport services in CETA, found in chapter 14 of the CETA agreement.

[195] The WTO commitment contains few substantive rules on investor protection, but has no investor-State dispute settlement mechanism.

[196] In relation to investment protection the ISDS represent a turning point, in relation to the fair and equitable treatment (FET) standard and indirect expropriation.

[197] Kevin Ackhurst, Stephen Nattrass and Erin Brown, 'CETA, the Investment Canada Act and SOEs: A Brave New World for Free Trade' (2016) 31 ICSID Review: Foreign Investment Law Journal 58, p. 59.

[198] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, In particular paras. 6, 10, and 11 of the preamble as well as Chapter 22 concerning trade and sustainable development and Chapter 23 concerning trade and labour, and Chapter 24 concerning trade and environment.

[199] Ackhurst, Nattrass, Brown, 'CETA, the Investment Canada Act and SOEs: A Brave New World for Free Trade' (n 197), p. 58.

European Parliament. Bilateral agreements between the Member States and Singapore will cease to have effect with the entry into force of this NGFTA. This is because the new agreement will replace and supersede other agreements.[200]

The EUSFTA trade agreement can also be considered as one of the initial "new generation" bilateral agreements, since it contains important provisions on intellectual property protection, investment liberalisation, public procurement, competition and sustainable development. These provisions are on top of the classical removal of customs duties and non-tariff barriers for trade in goods and services. The objective of the EUSFTA is to liberalise and facilitate trade and investment in accordance with the provisions of the negotiated agreement,[201] and to establish free trade area consistent with Article XXIV of GATT and Article V of GATS.[202] The parties shall further progressively and reciprocally liberalise trade in goods.[203] In accordance with Article XI of GATT, neither party shall adopt or maintain any prohibition or restriction on the other party's importation of goods or exportation or sale for export of any goods.[204]

The EUSFTA has further commitments than current WTO's in many aspects. Moreover, the agreement does not only provide improved access to the Singaporean market but is also beneficial for European companies operating from Singapore across the Southeast Asian region. The agreement will provide a framework to facilitate and increase trade in goods between the parties, and prevent and eliminate unnecessary barriers to trade.[205] The parties further recognized the importance of customs, and had agreed upon trade facilitation and reinforcing cooperation in order to ensure that the legislations and procedures fulfil the objectives of an effective customs control.[206] Furthermore, the parties shall cooperate towards removing or reducing tariffs as well as non-tariff barriers to trade in order to foster regulatory convergence with or towards regional international standards.[207]

The parties shall, through the adequate level of protection of intellectual property rights and effective enforcement, increase the benefit from trade and investment, and facilitate the production and commercialisation of innovative and creative products.[208] In relation to issues of standards and certification, good regulatory practices, cooperation on standards and

[200] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018) Chapter 9, Investment, Section A, Article 9.10.

[201] Ibid., Article 1.2 Objectives.

[202] Ibid., Chapter one, objectives and General definitions, Article 1.1.

[203] Ibid., National Treatment and Market access for goods, Section A, Article 2.1.

[204] Ibid., National Treatment and Market access for goods, Section C, Article 2.9.

[205] Ibid., Chapter 4, Technical Barriers to Trade, Article 4.1.

[206] Ibid., Chapter 6, Customs and Trade Facilitation, Article 6.1.

[207] Ibid., Chapter 7, Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation, Article 7.1.

[208] Ibid., Chapter 11, Intellectual Property, Article 11.1.

transparency provisions, the outcome in the EU–Singapore agreement is considered to be similar to the KOREU's. Additionally, in line with the KOREU, the EUSFTA will also include sectorial annexes on technical barriers to trade.[209]

The NGFTAs contain rules in order to better benefit the playing field for the operators. For example, they comprise competition rules, where the parties acknowledge the importance of free and undistorted competition. Otherwise, the proper functioning of their markets may be distorted, and the benefits of trade liberalisation may be undermined.[210]

In Opinion 2/15, The CJEU decided that the EUSFTA has to be concluded as a mixed agreement,[211] where it has to be ratified by all Member States.[212] The EUSFTA was divided into two sections, and it now constitutes two parallel agreements to be signed as partnership and cooperation agreements. Once it is entered into force, it will constitute the legal framework to further develop strong and longstanding partnership between the EU and Singapore.[213] On April 18, 2018, the European Commission presented to the Council the free trade agreement split into two segments: one being the EUSFTA, and the other being the EU–Singapore Investment Protection Agreement.[214]

The chapter regarding dispute settlement is made to avoid and settle any difference between the parties, concerning the interpretation and application of the agreement.[215] The parties have also agreed on effective enforcement of the framework to settle disputes in an effective and transparent manner.[216] Rulings from the bilateral arbitration panel can be obtained faster than those from the relevant WTO dispute settlement system.[217] Dispute settlement is used to settle differences between the parties concerning interpretation and application of the agreement.[218]

When there is a conflict between the parties, an investor wishing to challenge the action of the host state can, through arbitration to the ICS, either challenge indirectly via a State-to-

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[209] IBEC Irish Business and Employers Confederation, 'EU--Singapore Free Trade Agreement' (2011) Quarterly Trade Bulletin <http://www.ibec.ie/IBEC/Publications.nsf/vPages/Trade_Bulletin~trade-bulletin---march-2011-10-03-2011/$file/IBEC+trade+publication+Mar2011.pdf> accessed 20 April 2017.

[210] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Chapter 12, Competition and Related Matters, Section Antitrust and Mergers, Article 12.1.1.

[211] Opinion of the Court of Justice of 16 May 2017, *(Singapore FTA)*, 2/15, EU:C:2016:992.

[212] Marc Maresceau, 'A Typology of Mixed Bilateral Agreements' in Panos Koutrakos (ed), *Mixed Agreements Revisited: The EU and Its Member States in the World*, vol Bloomsbury Collections (Hart Publishing 2010), p. 12.

[213] European Commission 'Fact Sheet: Memorandum, Key elements of the EU-Singapore Trade and Investment Agreements' 2018 <www.europa.eu/rapid/press-release_MEMO-18-3327_en.pdf> accessed 30 June 2018.

[214] 'Investment Protection Agreement Between the European Union and Its Member States, Of The One Part, and The Republic Of Singapore, of the Other Part' 2018accessed EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018)

[215] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Chapter 15, Dispute Settlement, Section A, 15.1.

[216] Ibid., Chapter 15, Dispute Settlement, Section A, 15.1.

[217] Ibid., Chapter 15, Dispute Settlement, Section A, 15.5.

[218] Ibid., Chapter 15, Section A, objective and scope, Article 15.1.

State dispute settlement, or challenge directly via the ISDS.[219] Both parties in the NGFTA are committed to a high level of transparency when it comes to rule making, where they recognise the impact which their respective regulatory environments may have on trade and investment. Furthermore, the parties shall have a predictable and regulatory environment for economic operators, including small and medium-sized enterprises.[220]

1.4 EU–US FTA (TTIP)

The first round of talks for the EU–US Transatlantic Trade and Investment Partnership (TTIP) came to a closure in July 2013. The negotiating directive for TTIP was released in October 2014.[221] Between July 2013 and October 2016, 15 negotiation rounds had been held.[222] The negotiation of the TTIP agreement was conducted by the European Commission and the US Trade Representative. Although the former negotiations have been stalled, with the possibility of terminating the talks,[223] the TTIP agreement's negotiations might be reopened.[224]

The TTIP was planned to be based on common values, including the protection and promotion of human rights and international security. It was intended to be ambitious, comprehensive, and fully consistent with the rules and obligations of the WTO. The liberalisation of trade in goods and services, and other trade-related issues should have been of reciprocal manner and go beyond the WTO commitments.[225]

The objective of the TTIP is:

> (...) to increase trade and investment between the EU and the US by realising the untapped potential of a truly transatlantic market place, generating new economic

[219]European Parliamentary Research Service (EPRS) 'From Arbitration to the Investment Court System (ICS) - the Evolution of CETA Rules' 2017 <http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA(2017)607251_EN.pdf> accessed 27 March 2017, pp. 5-6.

[220] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Chapter 14, Transparency, Article 14.1.

[221] Council of the European Union 'Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America' 2014 <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> accessed 23 June 2015.

[222] Office of the United States Trade Representative 'Press release: U.S.-EU Joint Report on T-TIP Progress to Date' 2017 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/us-eu-joint-report-t-tip-progress-0> accessed 15 December 2017.

[223] 'France urges Brussels to halt TTIP talks' *Financial Times* (London, 30 August 2016) <https://www.ft.com/content/154ecba2-6e82-11e6-a0c9-1365ce54b926> accessed 15 February 2018.

[224] Richard Bravo, Julia Chatterley, 'Trump Is Willing to Reopen TTIP Amid EU-U.S. Trade Dispute, Ross Says' *Bloomberg* (New York, 29 March 2018) <https://www.bloomberg.com/news/articles/2018-03-29/trump-willing-to-reopen-ttip-amid-eu-u-s-trade-spat-ross-says> accessed 6 April 2018.

[225] 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America' 2014accessed Council of the European Union 'Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America', provisions 1-5.

opportunities for the creation of jobs and growth through increased market access and greater regulatory compatibility and setting the path for global standards.[226]

The Commission emphasized three main purposes of the TTIP. Firstly, the TTIP aims to improve the access of EU companies to the US market, and by consequence, also facilitate exports and imports, as well as making overseas investments easier and more secure. This would be accomplished by cutting or removing custom taxes on goods exported from the EU to the US.[227] Secondly, because of the different standards and rules between the two parties, the Commission aims to facilitate the export by regulatory cooperation. This means that even though standards are usually conforming, it is the technical details and procedures that are employed to verify that the standards have been met. When the standards are conforming, the TTIP would promote mutual recognition of rules for the different technical details and procedures. When the standards are non-conforming, they would be replaced by new compatible rules.[228] Thirdly, introducing new rules will facilitate trade for companies with access to energy and raw materials, and provide better protection for intellectual property and investment.[229]

The EU and the US have had a long-term cooperation with the EU–US Positive Comity Agreement from 1998, the Administrative Arrangement on Attendance (AAA),[230] and the US–EU Merger Working Group in 2011.[231] Through international arbitration, ISDS became a major stumbling block in the negotiations of the TTIP. The ISDS was to be characterised by transparency and independence of arbitrators, and predictability is also to be included.

1.5 EU–Japan Economic Partnership Agreement (EPA)

The negotiations for the EU–Japan Economic Partnership Agreement (EPA) were launched in 2013. In July 2017, the parties reached an agreement in principle on the main elements, and the negotiations were finalised in December 2017. On 17 July 2018, at the EU-

[226] 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America', provisions 7-9.

[227] European Commission 'Factsheet on Trade in goods and customs duties in TTIP' 2016 <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_152998.1%20Trade%20in%20goods%20and%20customs%20tariffs.pdf> accessed 18 December 2016.

[228] European Commission 'Factsheet on Regulatory Cooperation in TTIP' 2016 <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153002.1%20RegCo.pdf> accessed 18 December 2017.

[229] European Commission 'How TTIP would work: New rules - to make it easier and fairer to export, import and invest - rules ' <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/contents/#_rules> accessed 25 November 2016.

[230] Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the enforcement of their Competition Laws, between the European Community and the European Coal and Steal Community of the one part and the Government of the United States of America. [1998] OJ L 173/28.

[231] Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws [1995], This agreement sets forth administrative arrangements between competition authorities concerning reciprocal attendance, and similarly.

Japan summit in Tokyo, the leaders signed two landmark agreements: The Strategic Partnership Agreement and the Economic Partnership Agreement.[232] After the legal verification and translation processes, the European Commission can submit the agreement for the approval of the European Parliament and Member States. The European Commission has proposed to the Council and European Parliament to approve the EPA.

In 2018, on April 18, the Commission presented the text of the agreement to the Council. It marks the beginning of a ratification processes at the EU where the agreement aims to be entered into force by the end of the current mandate of the European commission in 2019.[233]

The EPA is considered to be a comprehensive FTA; and it goes beyond the FTA standard commitments by also regulating movement of people and investment rules.[234] The EPA differs significantly, in both scope and level of ambition, from earlier FTAs that Japan concluded with other partners. The EPA, as a comprehensive FTA, will cover a higher number of market access issues including tariffs, non-tariff measures affecting trade in goods (including TBT and SPS aspects) and services, further market access for services, investment and public procurement, competition, intellectual property rights, as well as specific chapters on investment protection.[235]

The EPA is considered to be the most important bilateral trade agreement ever concluded by the EU. Moreover, this agreement will be the first to include a specific commitment to the Paris Agreement.[236] The adaptation of the scope of the Common Commercial Policy (CCP) compels adopted tools of the EU trade policy as well in order to approach the new globalised demand to ensure that the EU remains open to the world and other markets.[237]

Prior to the EPA, The EU had established a Strategic Partnership with Japan in 2001; and the top leaders of the two parties have been meeting regularly at the annual EU–Japan Summit since 1991.[238] The EU is committed to integrating its new approach to investment protection

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[232] Council of the European Union '20th EU-Japan Summit Brussels 28 May 2011 Joint Press Statement' 2011 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/122305.pdf> accessed 28 March 2017.

[233] European Commission 'Fact Sheet: Key elements of the EU-Japan Economic Partnership Agreement' 2018 <http://europa.eu/rapid/press-release_MEMO-18-3326_en.htm> accessed 15 July 2018

[234] The difference between Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs) are essentially that an FTA is an international treaty to eliminate tariffs imposed between countries or regions and to abolish regulation in the field of foreign investments in trade in services. The content of an EPA revolves around a FTA but go further in certain aspects either in relation to movement of goods or people or transfer of innovation.

[235] European Commission, 'Commission Staff Working Document Impact Assessment Report on EU-Japan Trade Relations Accompanying the Document Recommendation for a Council Decision Authorising the Opening of Negotiations on a Free Trade Agreement between the European Union and Japan, (Staff Working Document Impact Assessment Report on EU-Japan Trade Relations)' COM (2012) 390 final, p. 31.

[236] European Commission 'EU and Japan Reach Agreement in Principle on Economic Partnership Agreement' 2017 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1686> accessed 10 May 2017.

[237]European Commission, Communication Global Europe - Competing in the world (n 6), p. 4.

[238] Europea Commisison Political Relations 'The EU and Japan have many common interests, and cooperate closely with one another in international and multilateral fora' 2017 <https://eeas.europa.eu/delegations/japan_en/19223/Political%20Relations)> accessed 26 June 2017.

and dispute resolution, and to an ICS, in all of its new trade agreements. The ICS is considered to create a more predictable environment for investors.

1.6 EU–Vietnam FTA (EVFTA)

The negotiations of this Free Trade Agreement started in October 2012 and were concluded in December 2015. In February 2016, following the announcement of the conclusion of negotiations, the text of the EU–Vietnam free trade agreement (EVFTA) was published. On 25 June 2018, the EU and Vietnam agreed on a final text of the FTA. The legal review of the negotiated text is currently on-going.[239] After the agreement is translated into EU's official language and Vietnamese, the Commission will provide the Council of Ministers with a proposal for approving the agreement. Thereafter, the Council will send the agreement to the European Parliament for ratification.

This agreement is the most ambitious and comprehensive FTA that the EU has ever concluded with a developing country. Most remarkable is the inclusion of its sustainable development objectives and provisions.[240]

The EU–Vietnam FTA includes areas in relation to market access, trade remedies and other trade rules regulating national treatment, custom and trade facilitation, technical barriers to trade, trade in services, investment and e-commerce, government procurement, competition policy, intellectual property, dispute settlement, sustainable development, and transparency.[241] Trade liberalisation, social justice and respect for human rights, and high labour and environmental levels of protection also go hand in hand in the FTA. This makes part of the Commission's new strategy on trade and investment.[242] Trade policy should not only deliver growth, jobs and innovation, but also promote European and international values.

Prior to EVFTA, Vietnam had preferential access to the EU through the Generalised Scheme of Preferences granted by the EU to developing countries. However, this was accomplished under the unilateral control of the EU, who could, at any time, change the conditions. Additionally, Vietnam could only have access to products defined by the EU.[243] The FTA is now mutually beneficial, and has emphasis on sustainable development, as well as

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[239] European Commission, 'Countries and regions: Vietnam' <http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/> accessed 10 August 2018.

[240] European External Action Service 'Guide to the EU-Vietnam Trade Agreement' 2016 <https://eeas.europa.eu/sites/eeas/files/evfta_guide_fiinal.pdf> accessed 05 January 2018.

[241] 'EU-Vietnam Free Trade Agreement: Agreed text as of January 2016'.

[242] European Commision 'Trade for All - Towards a More Responsible Trade and Investment Policy' (n 10).

[243] European Parliament 'Briefing: EU-Vietnam free trade agreement' 2018 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614702/EPRS_BRI(2018)614702_EN.pdf> accessed 15 March 2018, This preferential access would be automatically terminated three years after Vietnam's Gross National Income exceeds the World Bank threshold for upper-middle-income countries.

strong commitments to fundamental labour rights and environmental protection. Moreover, the EVFTA also includes provisions regarding human rights.[244]

To ensure the proper operation of this agreement, there will be trade committees and specialised working groups.[245] The FTA also provides a permanent dispute resolution system to settle disputes that relate to the investment protection provisions, such as protection against expropriation without compensation, non-discrimination or fair and equitable treatment (FET).[246] The agreement sets up a permanent investment tribunal system, under which such above-mentioned disputes can be submitted. Moreover, the decisions can be appealed through an appeal tribunal, which will ensure the legal correctness and provide certainty in relation to the interpretation of the agreement.[247]

2 Legal and Institutional Framework for Negotiating NGFTAs

The EU possesses a legal personality to conclude international agreements on behalf of its Member States according to Article 47 TEU. The EU's legal personality makes it subject to international law capable of negotiating and concluding international agreement with the competence that is conferred upon it from the Member States by the treaties. The negotiations with Singapore and Canada have shown a clear example on how the structure of an agreement may provide difficulties for the EU in terms of its internal difference within its constitutional organs and Member States. In some cases, this can even lead to stalled negotiations, such as in the case of TTIP. The CCP does no longer, after the Lisbon Treaty, address the notion of mixed agreements.[248] In contrast to Article 218 TFEU, there are no treaty rules in relation to the exact way of providing a proper negotiation of a mixed agreement.[249]

2.1 The Legislative Procedure

According to Article 207(2) TFEU, the conclusion of a trade agreement should be made in accordance with the ordinary legislative procedure as provided for in Article 294 TFEU. The Commission initiates by submitting recommendations to the Council. The Council then

[244] European External Action Service 'Guide to the EU-Vietnam Trade Agreement', p. 23.

[245] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Chapter 17 Institutional, General and Final Provisions, Article 17.1 Trade Committee, 3 (a).

[246] European External Action Service 'Guide to the EU-Vietnam Trade Agreement', p. 54.

[247] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Chapter 13, Section 3 Dispute Settlement Procedures Sub-section 1: Arbitration Procedure, Article 8 Dispute Settlement Proceedings of the Arbitration Panel.

[248] Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014), p. 186.

[249] Marise Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations; Salient Features of a Changing Landscape* (Cambridge University Press 2008), p. 63.

authorizes the commencement of the trade negotiation by providing the Commission with a negotiation mandate.[250] While conducting the negotiation, the Commission continuously informs the Council and the European Parliament of the progress and keeps the negotiation in accordance with the negotiation mandate.[251]

The conclusion of a bilateral trade agreement[252] requires the approval of the Council, acting by a qualified majority, and the consent of the European Parliament, acting by a simple majority.[253] The legal and institutional backgrounds are important to consider in relation to the negotiation and implementation of an agreement, such as the KOREU FTA.

If we consider the CETA as an example, the Council adopted a package of decisions by a written procedure on 28 October 2016. This package included a decision on the signature of the agreement, a decision on the provisional application of the agreement, and also a decision to request the consent of the European Parliament for the conclusion of the agreement. The Member States' representatives also adopted a joint interpretative instrument, which will provide a binding interpretation of the CETA's terms on specific issues.[254]

The EU adopted, through a proposal, the different parts (of the CETA) that fall within its competence, and also within the competence of its Member States, such as areas of the investment protection and the chapters concerning financial services, as well as the protection of intellectual property. In order to ratify and implement the agreement, each Member State must vote. The CETA cannot enter permanently into force until it is fully implemented by the Member States.[255] However, hopefully the benefits of the provisional approval may put additional pressure upon the Member States to ratify the agreement for fear of losing all the benefits they have experienced.

On 24 January 2017, the International Trade Committee of the European Parliament voted in favour of approving the CETA. This was followed, on 15 February 2017, with a vote by the

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[250] Article 207(3) Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C 326/47. TFEU

[251] Article 218(2) ibid. It reads: 'The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them'.

[252] The difference between bilateral and multilateral trade agreements is that in bilateral mixed agreements, the EU and its Member States are presented as one party despite the need for all of them to sign and ratify the agreement for it to enter into force; whereas in multilateral mixed agreements, although complementarity also applies, the EU and its Member States are different parties on their own right; and the agreement can enter into force if it is not ratified by all Member States, although third parties can always request a clarification concerning the division of competences. Guillaume Van Der Loo and Ramses A. Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions null' (2017) 54 Common Market Law Review 736.

[253] Article 207(3) and Article 218(6) Consolidated Version of the Treaty of the Functioning of the European Union.

[254] Council of the European Union 'EU-Canada Trade Agreement: Council Adopts Decision to Sign CETA' 2016 <http://www.consilium.europa.eu/en/press/press-releases/2016/10/28/eu-canada-trade-agreement/> accessed 28 March 2017.

[255] Council Decision 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

European Parliament in favour of ratifying the CETA. Unless the CETA is implemented properly and fully, it will not be able to realize its full economic potential as an NGFTA.[256]

2.2 The Different Stages of Negotiation

Negotiating an agreement can be distinguished through different levels, first the design of the negotiation mandate, secondly the representation of the EU during the negotiation, thirdly the ratification and fourthly the implementation and enforcement of the agreement.

When commencing a negotiation of an agreement, it is the role of the Council to authorize the European Commission to negotiate a new trade agreement on behalf of the EU, through a 'negotiating mandate'. The objectives, and scope in which the negotiation should be conducted, as well as the time frame of the procedure, in the Councils negotiating directive. The Commission would thereafter have the framework on which it will conduct its negotiation with the third country on behalf of the EU. The negotiation would be accomplished in close cooperation with the Council and the European Parliament.[257]

After the parties have agreed on the text, the Commission submits its formal proposals to the Council for adoption. The Council adopts a decision for the signature of the agreement on behalf of the EU. The signed agreement is then transmitted to the European Parliament for consent. If the European Parliament provides its approval, the Council thereinafter adopts the decision to conclude the agreement.[258]

The exercise of the competences in the CCP cannot, as we have seen, be used to circumvent the delimitation of competences between the EU and its Member States, affecting other legislative acts of regulatory provisions.[259]

2.2.1 Negotiations in the Different Agreements

The European Council is actively involved in determining the general direction of policies in the field of external relations.[260] To start negotiation, the Commission or High Representative make recommendations to the Council, who thereafter adopts a decision to authorize the

[256] European Parliament 'Legislative Train Schedule: EU-Canada Comprehensive Economic and Trade Agreement (CETA)' 2018 <http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-ceta> accessed 20 July 2018.

[257] Article 207(3) TFEU Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

[258] European Commission 'Negotiating EU trade agreements Who does what and how we reach a final deal' 2012 <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf> accessed 17 April 2018.

[259] Article 207(6) TFEU.

[260] Piet Eeckhout, *EU External Relations Law* (Oxford University Press 2011), p. 197.

opening of negotiations.[261] In relation to this type of agreements, the Commission[262] is then nominated as a negotiator.[263]

Moreover, the Council provides a directive that encompasses the guidelines of the negotiations for the Commission to follow.[264] The Commission also needs, throughout the negotiation, to consult with a special committee appointed by the Council, which is available to assist in the task, and within the framework of the directives given by the Council. Furthermore, the Commission shall regularly report to the special committee and the European Parliament on the progress of the negotiations.[265]

The legal and institutional background for the negotiation and implementation of the KOREU in the EU was of crucial importance for three reasons. First of all, given that it was the first agreement in the field of trade to be subject to the new procedures, which became applicable as a result of the entry into force of the Lisbon Treaty, a number of challenges were posed as regards untested procedures. Secondly, being the second largest trade agreement ever concluded by the EU, a number of substantive issues required attention during the process. These included the position of the European Parliament in safeguarding the investigations and the operation of certain provisions of the FTA. Thirdly, the procedure for ratification was closely watched, as it was likely to set down the framework for the ratification of future FTAs.[266] The various elements that make up the procedural and institutional framework are taken up in the following sections of this contribution.

Since the Lisbon Treaty, the EU possesses exclusive competence in market access liberalisation and investment protection. When starting the negotiations with Singapore, the negotiation mandate did not cover investment protection, therefore the Commission made a request to the Council to extend the negotiation mandate, so that the negotiation mandate would also include investment protection. The first drafted provision was initiated on 20 September 2013.

In March 2013, The Commission drafted a negotiation mandate, which was submitted to the Council of Ministers for approval by the Member States. In May 2013, the European

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[261] The 'recommendations' which the Commission or the High Representative make to the Council for the purpose of a decision to open a negotiation are not officially published.

[262] Article 218(3) The Commission should be the negotiator, except where the agreement envisaged relates exclusively or principally to the CFSP. Article 17 TEU, furthermore provides that the Commission shall have the power to 'ensure the Union's external representation'.

[263] Article 218(3) TFEU.

[264] The directive in this context refers to context of international negotiations where it constitutes the framework for the negotiation and is only addressed to the negotiator. These directives are not the same as the directives as in the meaning of Article 288 TFEU, which defines directive as a legislative instrument.

[265] Article 218(3) TFEU.

[266] Justyna Lasik and Colin Brown, 'The EU-Korea FTA: The Legal and Policy Framework in the European Union' in James Harrison (ed), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press 2013), p. 28.

Parliament passed a supporting resolution for the negotiation. In June of the same year, the Council of Ministers approved the Commission's submission, giving it a mandate to commence the negotiation. In October 2014, the negotiation directive was declassified as an attempt to make negotiations more transparent, in order to ensure that the general public had accurate and full information of the EU's intentions. In September 2015, the first draft of the investment section of the TTIP was released, conforming to the negotiation directive and giving a good insight on the EU's current position on the investment protection provisions. A big change is that the latest draft proposes the establishment of the entirely new ICS in the TTIP, complete with a framework on how this could work. According to the Commission, the establishment of an investment court is '(...) intended to be the stepping stones towards a permanent multilateral system for investment disputes'.[267]

When the negotiations of the EUSFTA started, investment protection was not included; therefore, the agreement was previewed to be concluded within the exclusive competence of the EU; that is, without the participation of the Member States. The Commission seeks an opinion from the CJEU regarding the allocation of competences between the EU and its Member States in relation to the NGFTA, under Article 218(11) TFEU. In Opinion 2/15, the Commission considers that the EU has exclusive competence to conclude the agreement. The submissions of the Council and its members contend that the EU does not have the competence to conclude the agreement within exclusive competence, since certain parts of the NGFTA fall within the shared competence of the EU and its Member States.

2.2.2 Transparent Negotiation

The negotiation of bilateral and regional agreements is often being criticized for lacking transparency, inclusiveness and equal participation of stakeholders and the public.[268] For this reason, the regulatory practices need to be negotiated with the national government as well as with a civil society organisation, as was noticed in the negotiations of CETA. The Commission learnt that it could only enter into negotiation with external partners as a homogenous actor, only if all parties are on the same side. The trade policy is a project, which is in a clear relation with the principle of cooperation, from both sides of the EU and its Member States. To accommodate this issue, the CETA required the EU to make substantial change in relation to transparency, and also in relation to social and environmental concerns. Establishing the EU as a homogenous actor will continue to be an on-going process.

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[267] European Commission 'Investment in TTIP and Beyond – the Path for Reform Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court' 2015 <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 14 April 2018.

[268] Anke Moerland, 'Do Developing Countries Have a Say? Bilateral and Regional Intellectual Property Negotiations with the EU' (2017) <https://link.springer.com/content/pdf/10.1007%2Fs40319-017-0634-6.pdf> accessed 6 January 2018.

2.3 Ratification Process

Ratification by just the EU is only possible when an agreement is concluded through exclusive competence, or through direct exercise of shared competence. When it is concluded as a mixed agreement, it has to go through a ratification process by all Member States. Such procedure is accomplished through the national parliaments of the Member States and is thereafter completed by a ratification process in the Council. The AG Sharpston described the process as likely to be both cumbersome and complex. This type of negotiation may become lengthy since they may be blocked by few Member States, or even by one Member State. [269]

Both the CJEU case law and the existing literature hardly cover what happens when a bilateral mixed agreement is not ratified.[270] Mixed agreements, which are not ratified, are considered as incomplete[271] or imperfect.[272]

This type of outcomes would lead to undermine the efficiency of EU external action and have negative consequences for the EU's relations for EU's relation with the third state concerned in the negotiation.[273] For Member States that have ratified an agreement, the agreement would fully enter into force within their territories. However, Member States that do not ratify would remain bound solely to the areas that fall within the exclusive competences according to Article 216(2) TFEU.[274]

Considering the CETA as an example, it is indicated in the preamble that the agreement concerns on the one part the EU and its Member States, and on the other part Canada.[275] This is because both, the EU and its Member States function as contracting parties to a mixed agreement;[276] and they have to act within their own competences.[277]

On the other hand, the ratification of multilateral mixed agreements, where one or several Member States do not ratify, does not lead to the same issues as when a bilateral agreement is

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[269] Advocate General Sharpston in Opinion of the Court of Justice of 21 December 2016, *(Singapore FTA)*, 2/15, EU:C:2016:992.

[270] David Kleimann and Gesa Kübek, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15' (2018) 45 Legal Issues of Economic Integration 13.

[271] The term "incomplete" mixed agreements was introduced by David O'Keeffe and Henry G Schermer, *Mixed agreements* (Deventer: Kluwer Law and Taxation 1983), p. 26. Allan Rosas, 'The European Union and Mixed Agreements' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* vol Modern Studies in European Law (Hart Publishing 2010), pp. 203-204.

[272] Jan Peter Hix, 'Mixed Agreements in the Field of Judicial Cooperation in Civil Matters: Treaty-Making and Legal Effects' in Bernd Martenczuk and Servaas van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (2008), pp. 211-256.

[273] Opinion 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269).

[274] Ibid.

[275] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[276] Judgment of the Court of Justice of 2 March 1994, *European Parliament v Council of the European Union*, C-316/91, ECLI:EU:C:1994:76, para. 29.

[277] Judgment of the Court of Justice of 28 April 2015, *European Commission v Council of the European Union*, C-28/12, ECLI:EU:C:2015:282, para. 47.

not ratified by all parties. This is namely because most agreements can only enter into force once a number of signatory states has ratified the agreement.[278] In a multilateral agreement, there is the possibility for Member States to join at a later stage. For this reason, it could be considered 'less incomplete'.[279] In certain situations, this is even expressly allowed for in the Council's decision when concluding the agreement.

The issue that really makes a bilateral mixed agreement differ from a multilateral agreement is the inclusion of an entry into force-clause, which states that the agreement can only enter into force after all 'the Parties' have deposited their respective instrument of ratification or approval.[280]

2.4 Provisional Application

There is the possibility to apply NGFTAs through provisional application. This means that the agreements may start applying even before the ratification process is fully completed. With this type of wide subject ranged agreements, the concern is related to the extent the provisional application should be assumed, when provisionally applied. While applying an agreement provisionally, the EU can only act within the limits of the competences conferred upon it. That naturally means that it may solely apply the parts of the agreement which falls within the scope of its competences.[281]

For example, in the KOREU, the question was about the areas that would be covered as shared or exclusive competence. The Commission only accepted the Member States' competence to cover a limited number of areas referring to '(…) certain commitments in the Protocol on Cultural Co-operation'.[282] The KOREU is different from previous agreements because it requires the identification of parts that are not to be provisionally applied in Article 15.10 (b).[283]

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[278] The Paris Agreement adopted under the United Nations Framework Convention on Climate Change reads: "This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession", Councel Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change [2016] OJ L 282/1, Article 21.1.

[279] Hix, 'Mixed Agreements in the Field of Judicial Cooperation in Civil Matters: Treaty-Making and Legal Effects' (n 272), pp. 211-256.

[280] Article 15.10 EU-Korea FTA.

[281] Andrei Suse and Jan Wouters, 'The Provisional Application of The EU's Mixed Trade And Investment Agreements' (2018) Working Paper No 201 <https://ghum.kuleuven.be/ggs/publications/working_papers/2018/201suse> accessed 5 September 2018. p. 22.

[282] European Commission, 'Proposal for a Council Decision Authorising the Signature and Provisional Application of the Free Trade Agreement between the European Union and its Member States and the Republic of Korea (Proposal to Authorise Provisional Appplication of the KOREU)' COM (2010) 136 final, p. 4.

[283] When a party acknowledges that certain provisions of the agreement cannot be provisionally applied, it needs to notify the other party of those provisions. "Notwithstanding subparagraph (a), provided the other Party has completed the necessary procedures and does not object to provisional application within 10 days of the notification that certain provisions cannot be

This development was possible due to the changes and clarification of competences given by the Lisbon Treaty. Article 2(2) TFEU[284] mentions certain other areas which fall under shared competence. From the reading of this provision, one can draw the conclusion that the EU could potentially act in all areas other than those specifically reserved for the Member States. Moreover, Article 4(2) TFEU lists areas subject to shared competence. In the KOREU, the provisions, which were not provisionally applied, were those of the Protocol on Cultural Co-operation, and certain provisions on the criminal enforcement of intellectual property rights given their perceived sensitivity for Member States. Almost the entire KOREU was provisionally applied according to the Council decision Article 3(2); furthermore, the extent of provisional application did not have a precedential effect.[285] However, such provisional application cannot have a retroactive effect, and be understood as affecting the division of competence.[286]

In relation to mixed agreements, the EU frequently uses provisional application of the agreements that are awaiting the procedure for completion, i.e., awaiting the Member States' ratification. The ratification process can take time, and it can also lead to a serious delay for the agreement to enter into force.[287] To apply an agreement provisionally, the Council should, upon a proposal by the negotiator, adopt a decision to authorize the provisional application of the agreement according to Article 218(5) TFEU.[288] In this instance, there is no requirement for the consent of the European Parliament. However, in accordance with an inter-institutional agreement between the Commission and the Parliament,[289] information shall be provided to the Parliament '(…) in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take the Parliament's views as far as possible into account'.

The provisional application, which is stipulated in the CETA agreement under Article 30.7(3), provides that if a party does not intend to provisionally apply the entire agreement, it

provisionally applied, the provisions of this Agreement which have not been notified shall be provisionally applied the first day of the month following the notification." EU-Korea FTA, Article 15.10.b.

[284] When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. For further detail, see Chapters II-III.

[285] EU-Korea FTA, Article 15.10.5 The Agreement shall be applied on a provisional basis by the Union, pending the completion of the procedures for its conclusion. The following provisions shall not be provisionally applied: Articles 10.54 to 10.61 (criminal enforcement of intellectual property rights), Articles 4(3), 5(2), 6(1), 6(2), 6(4), 6(5), 8, 9 and 10 of the Protocol on cultural cooperation.

[286] Lasik, Brown, 'The EU-Korea FTA: The Legal and Policy Framework in the European Union' (n 266), pp. 33-34.

[287] EU-Korea FTA.

[288] Article 25 Vienna Convention on the Law of Treaties [1969].

[289] Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L 304/47, para. 7.

can notify the other party and offer to enter into consultations. If the other party objects, then, the entire agreement shall not be provisionally applied. This could also mean that certain provisions should not apply provisionally.

According to this provision, a party cannot at any time terminate the provisional application by a written notice. It becomes particularly interesting in relation to mixed agreements where the Member States can alone also terminate a provisional application since they are contracting parties to the international treaty. Germany and Austria '(…) declare that as Parties to CETA they can exercise their rights which derive from Article 30.7.3(c) of CETA'.[290]

However, a statement by the Council clarifies that:

> If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures.[291]

In this regard, a Member State cannot by itself terminate the provisional application, but such termination requires a decision by the Council adopted by a qualified majority.[292]

In the CETA agreement, only certain provisions in Chapter 8 on investments were decided to be provisionally applied.[293] This means that all other provisions, which are not selected, will not be applied provisionally. This includes provisions on the treatment of investors and covered investments, expropriation, and resolution of investment disputes between investors and states. Further exceptions are, for example, stipulated for particular provisions of Chapter 13 (Financial Services).[294]

2.5 Implementation

The fundamental principles, such as direct effect, primacy and effective protection, guard the implementation of EU law through domestic Member States' courts. The domestic courts

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[290] Council of the European Union, 'Statement of the General Secretariat of the Council to the Council, on Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, (Statement on CETA)' COM (2017) 493 final , para. 72. Here the German Federal Constitutional Court in a recent decision emphasized the importance of Germany having the option to terminate the provisional application of CETA.

[291] Ibid.

[292] From a procedural point of view, it could be argued that the legal basis could be applied through Article 218(5) or 218(9) TFEU by analogy. This is because both provisions contain simplified procedures, prescribing no active participation by the European Parliament.

[293] Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2016] OJ L 11/1080, Investment Chapter are Articles 8.1-8.8, 8.13, 8.15, with the exception of para. 3 thereof and 8.16.

[294] Ibid.

have to be careful when applying EU law to '(…) ensure that those rules take full effect and must protect the rights which they confer on individuals'.[295]

Judicial implementation of EU law is, first of all and according to the principle of conferral, governed by the principle of procedural autonomy. It is established case law that

> (…) in the absence of EU rules governing the matter, it is for each Member State, in accordance with the principle of the procedural autonomy of the Member States, to lay down the detailed rules of administrative and judicial procedures governing actions for safeguarding rights which individuals derive from EU law.[296]

However, national rules should not affect the implementation of EU law; and national procedural autonomy is limited by the principles of equivalence and effectiveness[297] affirmed in the case *Rewe.*[298] This would lead to a balancing exercise between effective implementation and national interests (for example, legal certainty, where effectiveness impacts on *res judicata,* or procedural protection where effectiveness impacts on an *ex officio* review).

2.5.1 The European Parliament's Increased Power in Implementation

The Lisbon Treaty made certain changes in the division making process for trade agreements. Before the Lisbon Treaty, most decisions were taken by the Commission and the Trade Policy Committee. The European Parliament had very limited influence, and no substantive power in decision-making.[299] Trade agreements were concluded without parliamentary involvement, which had democratic consequences for exclusive competence. In fact, for trade agreements, based on shared competence, the Parliament's involvement was required; however, it was unable to effectively scrutinize the EU's external trade policy.[300]

The Lisbon Treaty tried to assist with this issue by establishing the requirement to make regular reports to the European Parliament during the negotiation process, and to have its consent. The European Parliament became even more important because of the CCP expansions including trade in services, commercial aspects of Intellectual Property, and Foreign Direct

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[295] Judgment of the Court of Justice of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, ECLI:EU:C:1978:49, para. 19.

[296] Judgment of the Court of Justice of 6 October 2015, *Orizzonte Salute - Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino – Città di Levico Terme and Others*, C-61/14, ECLI:EU:C:2015:655, para. 3.

[297] The principle of equivalence, according to which actions are based on an infringement of national law and similar actions based on an infringement of EU law would be treated equally, is the expression of non-discrimination. The principle of effectiveness, according to which national procedural rules should render impossible or excessively difficult the benefit of rights deriving from EU law, is the expression of the principle of loyalty.

[298] Judgment of the Court of Justice of 11 October 1973, *Rewe Zentralfinanz v Landwirtschaftskammer Westphalen-Lippe*, C-39/73, ECLI:EU:C:1973:105.

[299] Stephen Woolcock, *European Economic Policy Diplomacy The Role of EU External Economic Relations* (Ashgate Publishing 2012), p. 56.

[300] Stephen Woolcock, 'The Potential Impact of the Lisbon Treaty on European Union External Trade Policy' (2008) Swedish Institute for European Studies, European Policy Analysis <http://www.sieps.se/sites/default/files/427-20088epa.pdf> accessed 20 July 2016., p. 29.

Investment (FDI). These changes provided the European Parliament with more power, but its influence is still not comparable to that of the Council. This is because the European Parliament still cannot authorize negotiation, and in this regard, it is still not possible to suggest that it can effectively influence the EU's external trade policy.[301] In fact, the power of the European Parliament to give its consent means that the European Parliament should be taken into consideration during the negotiation of a trade agreement in order not to veto against it afterwards.[302]

The consent can go a long way. In fact, in the KOREU, a joint declaration was concluded, where the Commission committed to respond to the adoption by the European Parliament of a resolution calling for a safeguard investigation,[303] and to report, at the request of the responsible committee, on Korea's implementation of the non-tariff barrier and sustainable development commitments. The joint declaration gives a structure to any requests by the Parliament for an action on a particular issue. 'The parliament is placing itself in the system for implementing the EU-Korea in the future, something which it is not, as a legislative body, normally called upon to do.'[304]

By leveraging its position, through the generated form of consent requirement to create a system, the Parliament succeeded in ensuring a certain oversight of the future implementation of the KOREU.[305]

The focus of the European Parliament tends to be set more on issues that are not related to trade liberalisation such as human rights, labour or environmental standards.[306] This was shown in the Anti-Counterfeiting Trade Agreement (ACTA), where the European Parliament refused to give its consent for the signing of the agreement, because the protection of fundamental human rights had not been considered.

In relation to the political sensitivities inherent in the new institutional balance, established by the Lisbon Treaty, the European Parliament played a key part in the management

[301] Rafael Leal-Arcas, 'The EU's New Common Commercial Policy after the Treaty of Lisbon' in Martin Trybus and Luca Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar Publishing 2012), pp. 274-275.

[302] Ibid pp. 276-277.

[303] Interesting to note here is that, normally this is outside the parliaments function and it should have no role in issues regarding the implementation of EU law.

[304] Lasik, Brown, 'The EU-Korea FTA: The Legal and Policy Framework in the European Union' (n 266), p. 35.

[305] Ibid.

[306] Woolcock, *European Economic Policy Diplomacy The Role of EU External Economic Relations* (n 299), p. 61.

of the KOREU.[307] The KOREU is considered to be the first agreement subject to the new power of the European Parliament.[308]

2.5.2 The Power of the Council in Relation to the Implementation

Once the parliament has given its consent,[309] and all the Member States have ratified the agreement the Council adopts the final decision on concluding the agreement.

By nature, the implementation is trailing the negotiation process and will be adjusted in order to ensure that the specific policy objectives of the agreement at stake will be ensured.

The more ambitious and comprehensive a trade agreement is the more complex and resource -intensive the implementation will be. Given the new generation and their comprehensive scope, it is important to consider the aspects where they are falling short in order to attempt to improve aspects which can facilitate an effective implementation in future trade agreements. The commission is trying to emphasis a smooth transition from negotiating to implementation, through provisional application.[310]

2.5.3 Implementation of Mixed Agreements

When agreements are concluded as mixed agreements, the EU can still exclusively implement them. In the *OTIF* case, the CJEU reaffirmed that if the EU negotiates agreements as mixed agreements, this does not prevent an exclusive EU's implementation. The CJEU furthermore confirms that despite the mixed nature of the agreement, the Council may adopt a position on aspects concerning shared competences.[311] The positions taken within the framework of the agreement are also not dictated by the nature of the agreement itself. Consequently, this can have an impact on the scope of activity of the Commission in relation to both the trade committees, which are set up by the FTAs, and also to determining the respondent in the investor-state disputes.

There has been some discussion on how to interpret provisions in an agreement where the provisions can apply to both the situations falling within the scope of national law and to situations falling within the scope of EU law. In the case of *Lesoochranárske zoskupenie*, this was a concern and the CJEU announce that, in situations where a provision falls within both the scope of the national law and the EU law it is within the interest of EU law. This is so due

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[307] Lasik, Brown, 'The EU-Korea FTA: The Legal and Policy Framework in the European Union' (n 266).

[308] European Parliament, Directorate-General for External Policies, Policy Department 'An Assessment of the EU-Korea FTA' 2010 <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA_ET(2010)133875_EN.pdf> accessed 13 July 2018, p. 1.

[309] To not is that such requirement is in relation to areas which are subject to co-decision between the EU and MS.

[310] European Commission 'Report on Implementation of EU Free Trade Agreements 1 January 2017 - 31 December 2017' 2018 <http://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157468.pdf> accessed 15 July 2018p. 8.

[311] Judgment of the Court of Justice of 5 December 2017, *Federal Republic of Germany v Council of the European Union*, C-600/14, ECLI:EU:C:2017:935, para. 87.

to the task of the CJEU to forestall future differences of interpretation and preserve a uniform interpretation of circumstance.[312] The reason why this should be determined by the CJEU is essentially in order to prevent fragmentation and legal uncertainty.[313]

Consequently, it is important to underline the importance of uniform interpretation also in mixed agreements, mainly due to that the discussions that these cases promoted. The otherwise imaginable situation would be that there is a risk of a neutral provision being construed differently depending on the circumstance of its application. In this regard the duty of cooperation is the key. In the *Dior* case the CJEU underlined that there is a need for a cooperation in order to sustained uniformity of EU law.[314] The CJEU instead meant that the duty of sincere cooperation should be considered as an instrument to protect the specific Union interest in the *Hermès* case. This is because competence alone could not justify that the exclusive jurisdiction of the Court and also extends to situations not coming under Union competence.[315]

2.6 Renegotiations and Amendment to Signed NGFTAs

Article 218(7) TFEU is a provision that permits the Council to authorise the Commission to approve limited amendments to agreements. The Council may, in doing so, set down the conditions for the Commission to approve such amendments.

An example of how an agreement has made use of amendments would be the KOREU, and the decision on the signature, which contains two applications of Article 218(7). Firstly, in relation to the extension of the entitlement of Korean workers to co-production rights under EU policies promoting cultural diversity; and secondly, in relation to the addition of new protected geographical indications (GIs) to the list that is already established by the FTA. The procedure for the addition of new GIs is relatively unremarkable, since it implies an existing procedure to obtain the approval of new GIS, which is based on existing policy. However, the procedure for the entitlement for co-production rights is remarkable, because it requires unanimity in the Council to permit the continuation of the entitlement to co-production. This was considered appropriate, because of the very sensitive nature of such matters, and since the agreement

[312] Judgment of the Court of Justice of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, ECLI:EU:C:2011:125, para. 42; Judgment of the Court of Justice of 16 June 1998, *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV*, C-53/96, ECLI:EU:C:1998:292, para. 32; Judgment of the Court of Justice of 17 July 1997., *Giloy v Hauptzollamt Frankfurt am Main-Ost*, C-130/95, ECLI:EU:C:1997:372, para. 28.

[313] Opinion of Advocate General Sharpston Judgment of the Court of Justice of 8 March 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, C-240/09, ECLI:EU:C:2010:436, para. 58.

[314] Judgment of the Court of Justice of 4 November 1997, *Parfums Christian Dior v Evora*, C-337/95, ECLI:EU:C:1997:517 para. 25.

[315] Interpretation used by Marcus Klamert, Klamert, *The Principle of Loyalty in EU Law* (n 248), p. 205, C-53/96, Hermès International (n 312) para. 32.

would, *de facto*, be concluded by unanimity given that parts of the protocol on cultural cooperation fall under the exclusive competence of the Member States.[316]

"The Commission shall provide notice to Korea of the European Union's intention not to extend the period of entitlement to co-production pursuant to Article 5 of the Protocol on Cultural Co-operation following the procedure set out in Article 5(8) of the said Protocol unless, on a proposal from the Commission, the Council agrees four months before the end of such period of entitlement to continue the entitlement. If the Council agrees to continue the entitlement, then this provision will again become applicable at the end of the renewed period of entitlement. For the specific purposes of deciding on the continuation of the period of entitlement, the Council shall act by unanimity".[317]

Amendments to the FTA must first be considered by the Trade Committee.[318] Once adopted by the parties, it will enter into force after the parties have exchanged written notifications, certifying that they have completed their respective applicable legal requirements and procedures.[319]

There are clear differences between amendments and renegotiations. In fact, renegotiation of certain aspects of an agreement could, at least at an early stage, trigger ideas to make changes in other areas of the agreement as well. For this reason, it is usually avoided. In relation to the KOREU, the advantage to adopt investment provisions to the agreement at a later stage is that all of the investment related provisions would be kept regrouped together in one single instrument. However, if such would trigger the renegotiation of other aspects, it may be favoured to instead conclude a new comprehensive EU–Korea investment agreement.

2.7 Cooperation Obligations

It is essential to ensure close cooperation between the EU's institutions and Member States when an agreement falls partly within the competence of the EU, and partly within that of its Member States. This should apply in the process of negotiation and conclusion, and in the fulfilment of the commitments stemming from the agreement in action.[320] The reason hereto is to establish the unity in international representation of the EU.[321] It was further recognized by

[316] Lasik, Brown, 'The EU-Korea FTA: The Legal and Policy Framework in the European Union' (n 266), pp. 36-37.

[317] European Commission, Proposal to Authorise Provisional Appplication of the KOREU (n 282), Article 3.

[318] EU-Korea FTA, Article 15.1(4)(c).

[319] Ibid., Article 15.5(1).

[320] 1/78, Opinion on International Agreement on Natural Rubber (n 24), para. 34.

[321] 1/94, Opinion on World Trade Organization Agreement (n 27), para. 108, Opinion of the Court of Justice of 6 December 2001, *(Cartagena Protocol on Biosafety and the Transboundary Movements of Living Modified Organisms Resulting from Biotechnology)*, 2/00, EU:C:2001:664, para. 18; Judgment of the Court of Justice of 20 April 2010, *European Commission v Kingdom of Sweden*, C-246/07, ECLI:EU:C:2010:203, para. 73, C-28/12, Commission v Council (n 277) para. 54.

the CJEU in relation to the ratification of mixed agreements.[322] The duty of cooperation '(...) is of general application and does not depend either on whether the Community [now Union] competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries.'[323]

As Article 4(3) TEU reveals, the unity of the international representation is a way to apply the duty of sincere cooperation within the EU legal order.[324] The Member States are required, by Article 4(3) TEU, to facilitate the attainment of EU's objectives, and refrain from any measure that could jeopardize such objectives. In these circumstances, the CJEU may therefore impose obligation on the Member States not to depart from an agreed common negotiation strategy.[325] The principle is mutual in its nature and ensures that loyal cooperation shall be exercised by the Member States and the EU institutions 'in full mutual respect',[326] but not limited thereof and should apply in a similar fashion to inter-institutional cooperation.[327]

The CJEU has exclusively stipulated the existence of cooperation duties. It has also examined its application in relation to mixed agreements. Primarily, this was stated in the ambit of the European Atomic Energy Community (EAEC), but the CJEU clarified that it was to be applied also in the context of the European Economic Community (EEC): '[t]his duty of cooperation, of which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community.'[328]

This principle has become a fundamental tool for ensuring the external representation of the EU.[329] The Court emphasized that the duty of cooperation must be observed in all three stages of external action: negotiation, conclusion, and execution of agreements.[330]

However, a distinction has to be drawn between the external policy aims, on the one hand, and the EU's internal policy objectives on the other. The external policy is not intended to solely

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322 Opinion of the Court of Justice of 19 March 1993, *(Convention No. 170 ILO on Safety in the Use of Chemicals at Work)*, 2/91, EU:C:1993:106, para. 38. Interesting to note is that the ILO Convention 170 (at issue in Opinion 2/91) has been ratified by seven EU Member States only.

323 Judgment of the Court of Justice of 2 June 2005, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-266/03, ECLI:EU:C:2005:341, para. 58; C-246/07, Commission v Sweden (n 321) para. 64.

324 Steven Blockmans and Ramses A Wessel, 'Principles and Practices of EU External Representation' (2012) 2012/5 Centre For The Law of EU External Relations Cleer Working Papers <https://euglobal.wordpress.com/2012/09/20/cleer-working-papper-20125-principles-and-practices-of-eu-external-representation/> accessed 24 October 2015., p. 8.

325 C-246/07, Commission v Sweden (n 321).

326 Blockmans, Wessel, 'Principles and Practices of EU External Representation' (n 324), p. 13.

327 Judgment of the Court of Justice of 27 September 1988, *Hellenic Republic v Council of the European Communities*, C-204/86, ECLI:EU:C:1988:450.

328 2/91, Opinion on Convention ILO on Safety in the Use of Chemicals at Work (n 322), p. 36.

329 Leonhard Hertog and Simon Strob, 'Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term' (2013) 18 European Foreign Affairs Review 373, p. 380.

330 Judgment of the Court of Justice of 19 March 1996, *Commission of the European Communities v Council of the European Union*, C-25/94, ECLI:EU:C:1996:114, para. 48.

depend on the EU, but should also reflect the enlarged EU, and contribute to trade liberalization to help define a policy direction or strategy rather than function as an end purpose to which external policy is leading.[331] The partnership between the EU and the US will be based on common principles and values. These common principles and values have to be consistent with the principles and objectives of the EU's external action.[332] The idea about the cooperation for external relations is mainly to ensure that the action of the EU's international representation is coherent and consistent, stemming from the obligation of cooperation between the EU's institutions and Member States.[333]

The loyal cooperation has been taken into consideration in the different facets of the EU action, and loyalty duties have been established to ensure the internal functioning of the EU, as well as its external action. The principle is at the same time an expression of the international principle of good faith, the fidelity principle characterizing the federal systems ('*Bundestreue*'), and the requirement of unity underlying the European integration process. This is strictly linked with other fundamental principles of the EU legal order, such as effectiveness and supremacy.

The question of shared competence and potential issues in relation to the administration of the agreements was already discussed in relation to the GATS and Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreements.[334] The Commission argued that the Member States would seek to express their views individually on matters falling within their competence. This applies whenever no consensus was found, and interminable discussions would be required to determine the competence question. This, in turn, would lead to undermining the EU's unity *vis-à-vis* the rest of the world and therefore, the negotiation power would also be weakened.[335] However, the allocation of competence cannot depend on problems, which may possibly arise in administrating the agreements in relation to the coordination to ensure unity for both negotiation and implementation.[336]

This leads to the conclusion that in situations where the EU and its Member States have shared competences for an agreement, they are obliged to cooperate closely in the process of

[331] Marise Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relation Law: Constitutional Challenges* (Hart Publishing 2013), p. 19.

[332] Negotiations for the Transatlantic Trade and Investment Partnership (TTIP) European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) [2014] OJ C 265/35, p. 3.

[333] C-266/03, Commission v Luxembourg (n 323) para. 60; Judgment of the Court of Justice of 14 July 2005, *Commission of the European Communities v Federal Republic of Germany*, C-433/03, ECLI:EU:C:2005:462, para. 66.

[334] 1/94, Opinion on World Trade Organization Agreement (n 27) para. 106.

[335] Ibid, para. 106.

[336] Ibid, para. 107.

negotiation and conclusion, and in fulfilling their commitments.[337] Such obligations stem from the unity requirement in international representation.

The CJEU disregarded potential obstacles for the exercise of EU's competence on the international scene,[338] in the way that even if there is no possible contradiction between international commitments and the EU rules, the EU rules may be affected by the international commitments.[339] Already in Opinion 2/91, the CJEU stated that the EU competence, if needed, should be exercised internationally through the medium of the Member States, acting jointly in the EU's interest.[340] This, however, does not mean that the Member States would lose their visibility on the international scene just because they have lost their individual action in the attempt to fulfil their EU law obligations.[341]

3 Intermediate Conclusion

The negotiation of bilateral and regional agreements has often been criticized for its lack of transparency. It is important that the regulatory practices need to be negotiated with the national government as well as with the civil society, as was the case in the CETA. To accommodate to this issue, the CETA required the EU to make substantial change in relation to transparency, and also in relation to social and environmental concerns. Establishing the EU as a homogenous actor will continue to be an on-going process.

The structure of the agreement, with its wide subject range may provide difficulties in terms of EU's internal difference within its constitutional organs and Member States, the TTIP is a clear example hereto. The reformed CCP that resulted from the Lisbon Treaty has affected the legal basis of free trade agreements. The EU was subject to new procedures which raised challenges in relation to the negotiation, adoption, ratification, and implementation of these new trade instruments. In this new procedure the possibility to undermine the efficiency of EU external action and have negative consequences for the EU's relations with third state concerned remains. For this reason, it becomes even more important to focus on ensuring a close cooperation between the EU's institutions and Member States. This is specifically important when an agreement falls partly within the competence of the EU, and partly within

[337] Ibid, para. 108.

[338] Opinion of the Court of Justice of 14 October 2014, *(International Child Abduction)* 1/13, EU:C:2014:2303, para. 43.

[339] 2/91, Opinion on Convention ILO on Safety in the Use of Chemicals at Work (n 322) paras. 25 and 26; Judgment of the Court of Justice of 4 September 2014, *European Commission v Council of the European Union*, C-114/12, ECLI:EU:C:2014:2151, para. 71.

[340] 1/13, Opinion on International Child Abduction (n 338) para. 5.

[341] Inge Govaere, "'Setting the International Scene": EU External Competence and Procedures Post-Lisbon Revisited in the Light of ECJ Opinion 1/13' (2015) 52 Common Market Law Review 1277, p. 1297.

that of its Member States. Such cooperation should apply throughout the entire process of negotiation and conclusion, and in the fulfilment of the commitments stemming from the agreement in action.[342]

[342] 1/78, Opinion on International Agreement on Natural Rubber (n 24) para. 34.

CHAPTER III
THE EU COMPETENCE FOR NGFTAS AS NEW TRADE POLICY INSTRUMENTS

The EU has competence in the fields which are conferred to it by the Treaties. This chapter intends to define and analyse the different competences of the EU and its Member States in relation to the NGFTAs. Since this question became the core question of Opinion 2/15, the analysis will be conducted in relation to the discussion of the CJEU.

Firstly, it will address the EU's explicit and external competence through defining the areas falling under the common commercial policy in Article 207(1) TFEU. Once a certain area of action of the EU falls under the Common Commercial Policy (CCP), it falls under EU's exclusive competence pursuant to Article 3(1) TFEU. This naturally leads to consider which provisions that relates specifically to trade, and whether such provisions will have an immediate and direct effect on trade.

Secondly, it will address the EU's implied exclusive external competence for NGFTAs, where it will consider and identify the areas that fall outside of the CCP in order to determine whether implied exclusive competence could be established by virtue of Article 3(2) TFEU, through a legislative act of the EU, when it is necessary for the EU to exercise its internal competence, or when it may affect common rules or alter their scope.

Thirdly, it is substantial to also consider the EU's shared competence for NGFTAs, in order to be able to determine whether agreements such as NGFTAs should be concluded as mixed, or exclusive.

Fourthly, the framework and objectives, provides a larger role than before in its purpose of guiding the CCP. This because the CCP is carried out in the context of various and sometimes conflicting trade and non-trade objectives, established in Article 21 TEU, and the agreements are wide in scope and content. For this reason, the obligation for the EU to follow these objectives in its external action will be discussed and analysed together with the need for balancing of competence in relation to the choice of the appropriate legal basis and the delimitation of competence.

1 The EU's Explicit and Exclusive External Competence for NGFTAs

The EU's external trade policy is defined by the CCP. The CCP has a vital role for the EU's external relation. It is seen as the EU's voice to the rest of the world, as illustratively explained by Eeckhout as '(…) if the single market were a building the CCP would be its facade.'[343] The powers of the EU's external relations are based on the CCP, which establishes the core of the EU's external action. The CCP has always been an exclusive competence of the EU. However, what can be considered as attributed to the CCP has not always been the same.

Originally, services and intellectual property were considered to be within shared competences; however, they are now part of the CCP. The extent to which the scope of the CCP has been expanded is a result of the changes introduced by the Lisbon Treaty, in particular, regarding the commercial aspects of intellectual property, Foreign Direct Investment (FDI), and trade in services as provided in Article 207(1) TFEU.

The Commission tried to stretch the notion of CCP, by arguing that trade agreements which purely have a commercial focus should fall under exclusive competence.[344] The pre-Lisbon Treaty case-law shows a mixed understanding of the CJEU's approach to exclusive competence. This can be shown by the evolution of certain areas that were prior not considered to be within the CCP. For example, in relation to the case *Daiichi Sankyo*, after the Lisbon Treaty, the rules of TRIPS are an area covered by the CCP.[345] Given the longstanding case-law of the CJEU, the practical importance of clarifying the EU's competence should not be underestimated.[346]

Article 216(1) provides the EU to conclude an international agreement 'where the Treaties so provide'. If a particular subject matter falls within the CCP, the EU will enjoy exclusive external competence to conclude an international agreement in relation to that subject matter. The relevant query in relation to the question of competence for NGFTAs is whether their content matches or exceeds the scope of the CCP, and the EU's exclusive competence. For example, of particular concern is whether the EU's exclusive treaty-making competences extend to the entirety of EUSFTA's obligations including portfolio investment and transport services, and also in relation to the non-commercial provisions of the agreement such as 'moral

[343] Piet Eeckhout, *The European Internal Market and International Trade: A Legal Analysis* (Clarendon 1994), p. 344.

[344] European Parliament 'A guide to EU procedures for the conclusion of international trade agreements. Briefing October' 2016 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593489/EPRS_BRI(2016)593489_EN.pdf> accessed 5 November 2017, p. 5.

[345] However, this view was not shared by all the Member States.

[346] Friedrich Erlbacher, 'Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty' (2017) 2 CLEER Paper Series <http://www.asser.nl/media/3485/cleer17-2_web.pdf> accessed 4 April 2018, p. 13.

rights' of intellectual property holders and the agreement's chapter on 'sustainable development' (labour rights and environment protection).

In Opinion 2/15 the CJEU clarifies and nuances the picture of the interpretation of the Lisbon Treaty's codification of EU law on external competences. It does not only focus on the interpretation of the enlarged scope of the CCP but also on the application of Article 3(2) TFEU on implied external competence, on how the external powers may be derived from internal competence-conferring provisions.[347]

1.1 Explicit External Competence

Since the EU can only act when it is empowered by its Member States through the Treaties, the European Union must act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out in the Treaties.[348] This should be considered with respect to both the internal action and the international action of the European Union. The division of competences between the EU and its Member States will necessarily also have implications on the exercise of external competence, and on the ability of both, the EU and its Member States, to conclude international agreements.[349] The proper category of competence, in which the agreement should be concluded, needs to be established. An agreement may be concluded within either exclusive[350] or shared competence.[351] If the legal basis is exclusive, the explicit external competence is exclusive, under Article 207 TFEU on the CCP, and Article 3(1)(e) TFEU on exclusive competence.[352]

According to Article 3(1)(e) TFEU, the EU shall have exclusive competence in the area of CCP.[353] The CCP can be considered to include trade agreements which relate to services, commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy, and measures to protect trade, such as those to be taken in the event of dumping or subsidies.[354]

Article 207 TFEU make clear that the CCP is based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements. This should

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[347] Marise Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 European Constitutional Law Review , p. 235.

[348] Article 5(2) Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

[349] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 57.

[350] Article 3 TFEU.

[351] Articles 2 and 4 ibid.

[352] Alan Dashwood, 'Mixity in the Era of the Treaty of Lisbon' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010), p. 356.

[353] Article 3.1(e) TFEU.

[354] Bungenberg, 'Going Global? The EU Common Commercial Policy after Lisbon' (n 124) p. 127.

be in relation to 'trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.' Importantly is to consider that the CCP should be conducted in the context of the principles and objectives of the Union's external action.[355] The question of where to draw the limits between the different competences in the EU's external action is not as simple as it might appear. Defining a clear limit of CCP should be accomplished through the interpretation of Articles 206 and 207 TFEU. This is namely due to the fact that the structure establishing the competence is made in such a complex and multifaceted way. The question of competence is not always based on purely legal categorisations and contributions. The attempt to reach a limitation between the different categories becomes rather a sliding scale than fixed categories.[356]

Opinion 2/15 provided further clarification that will be analysed in this context, the Commission asked the CJEU to decide whether the EU has the competence to sign and conclude the FTA alone, and not as a mixed agreement.[357] It has been clear that the EU favours more of a strict interpretation of what is considered to be within its exclusive competence.[358] When it comes to defining the competence in the case of NGFTAs, where there may be different objectives to consider, ancillary objectives may be absorbed by more dominant objectives in the agreements.[359] The NGFTA has become the most significant instrument in EU's trade policy-making, because of the priority of bilateral avenues for trade liberalisation.[360]

The CCP concerns the external action by the EU in Article 206 TFEU and 207 TFEU. Regarding the aims of the CCP, by '(…) establishing a customs union the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.'[361] Moreover, the measures to be adopted in the framework of the CCP shall be based on:

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[355] Article 207 Consolidated Version of the Treaty of the Functioning of the European Union.

[356] Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (n 133), p. 43.

[357] 2/15, Opinion of Singapore FTA (n 211), para. 1.

[358] This conclusion is possible to draw also in relation to other policy areas relevant to the EU's external action such as in relation to the monetary policy in the Pringle case where the EU exclusive competence under Article 3(1)(c) TFEU was interpreted strictly where its delimitation from economic policy as a policy in which Member States merely coordinate within the Union (Article 5(1) TFEU).

[359] Ibid.

[360] European Commission External Trade 'Global Europe Competing in the World' (n 3).

[361] Article 206 Consolidated Version of the Treaty of the Functioning of the European Union.

> (…) uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The CCP shall furthermore be conducted in the context of the principles and objectives of the EU's external action.[362]

In order to view the balance between the EU's underlying policies of international trade and free trade agreements, the EU has been considered to offer a model for global integration law, working with the key constitutional features of the 'integration paradigm'.[363] This mainly reflects the EU's trade policy and underlying principles; unity and effectiveness are what make the CCP applicable in EU's external action.

1.2 The EU's Exclusive External Competence in Relation to Investment

Following Opinion 1/94, one could suggest that the CCP should no longer be regarded as dynamic. However, what matters is the interpretation of Article 207(1) TFEU, and that it is accomplished in a manner that provides the EU with an effective CCP in an international commercial environment, while, at the same time, respecting the wording of the provision. The commercial policy evolves over time. This means that it cannot be viewed in a static and rigid manner.[364] In this regard, when considering and comparing the commercial trade policy with other policies, for example in international law, such as trade policy or investment policy, they are not necessarily similar.

It is important that the CCP is conducted in an effective way since it would otherwise become irrelevant over time,[365] and prelude the EU from fulfilling its role as a global trading partner.[366] In fact, if the EU was not in a position to also avail itself of means of action going beyond instruments intended to have an effect only on the traditional aspects of external trade, it would no longer be possible to carry on any worthwhile Common Commercial Policy.[367]

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[362] Article 207(1) ibid.

[363] Ernst-Ulrich Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide: Lessons from European Integration Organizations: Lessons from European Integration' (2002) 13 European Journal of International Law 621, p. 621.

[364] Advocate General Wahl in Opinion of the Court of Justice of 14 February 2017, *(Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled)*, 3/15, EU:C:2016:657, para. 43.

[365] 1/78, Opinion on International Agreement on Natural Rubber (n 24), para. 44, Judgment of the Court of Justice of 26 March 1987, *Commission of the European Communities v Council of the European Communities*, C-45/86, ECLI:EU:C:1987:163, para. 20.

[366] 3/15, AG Wahl in Opinion on Marrakesh Treaty to Facilitate Access to Published Works for Disabled Persons (n 364), para. 43.

[367] 1/78, Opinion on International Agreement on Natural Rubber (n 24), para. 44, C-45/86, Commission v Council (n 365), para. 20.

1.2.1 Foreign Direct Investment

The Lisbon Treaty's expansion into the foreign direct investment is perhaps the most visible change; however, the exact scope of what the Foreign Direct Investment (FDI) should include is still debated.[368]

This discussion started even before the Lisbon Treaty with Krajewiki who considered that only the aspects of the FDI that which could be considered to be directly linked to international trade would fall within the EU's exclusive competence. This should furthermore be based on the context, object and purpose of the Treaties negotiated.[369]

It stands for a new important legal basis, solidifying the EU's competence in regard to certain aspects of foreign investment regulation.[370] This is particularly the case in relation to NGFTAs, and their negotiations with third countries.[371] The concept of foreign investment, as defined in international investment agreements, goes beyond FDI and portfolio investment.[372] The Treaty itself does not provide a definition of what constitutes FDI and portfolio investment, but there is a broader understanding of the characteristics of both areas.[373]

Chapter 9 of the CETA agreement relates to direct investment, and also to other types of investment. A direct investment has been defined by the CJEU as an investment made between natural or legal persons. This type of investments should serve to establish or maintain lasting and direct links between the persons providing the capital, and the undertakings to which that capital is made available. A foreign direct investment is when a foreign entity acquires a significant share in an EU's company that enables it to effectively participate in the

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368 Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 Common Market Law Review 383, p. 446.

369 Markus Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?' (2005) 42 Common Market Law Review 91p. 112–114, Note that he mentioned that even the discusssion for delebering the EU consitution before the lisbon treaty never suggested that the FDI should go beyond trade-related aspects of FDI.

370 Woolcock, Kleinheisterkamp, 'The EU Approach to International Investment Policy After the Lisbon Treaty, Communication on Investment Policy' (n 96), pp. 9-10; Jan Ceyssens, 'Towards a Common Foreign Investment Policy? Foreign Investment in the European Constitution' (2005) 32 Legal Issues of Economic Integration 259, pp. 267-277; Opinion of Advocate General Poiares Maduro Judgment of the Court of Justice of 14 September 2006, *Alfa Vita Vassilopoulos AE (C-158/04) and Carrefour Marinopoulos AE (C-159/04) v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, C-158/04, ECLI:EU:C:2006:212; Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?' (n 369) p. 114. The foreign investment regulation touches upon diverse regulatory interests, as it focuses mainly on the admission of foreign investment, its treatment and its protection against expropriation or political risks.

371 The main difference between IIAs and FTAs is basically that the IIAs does not address issues in relating to market access but rather promotes standards of protection that need to be applied with regard to foreign investment Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), pp. 2-6.

372 Noah Rubins, 'The Notion of "Investment" in International Investment Arbitration' in Stefan Michael Kröll and Norbert Horn (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer Law International 2004), p. 292.

373 Judgment of the Court of Justice of 12 December 2006, *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue*, C-446/04, ECLI:EU:C:2006:774, para. 180. In this case it was considered by the CJEU that nomenclature annexed to Directive 88/361/EEC of 24 June has indicative value for the interpretation of the concept of direct investment.

management or control of the Company.[374] The effective management participation or control carries out an economic activity which has a direct and immediate effect.[375]

Article 207(1) TFEU provides that EU acts concerning 'foreign direct investment' fall within the CCP. The EU has exclusive competence, pursuant to Article 3(1)(e) TFEU, even though the Council meant that EUSFTA's Chapter 9, concerning investment, relates to the protection of direct investment and not their admission, and should therefore not fall within CCP.[376] The CJEU established that this chapter falls within the EU's CCP as far as the provisions relate to foreign direct investment between the EU and Singapore.[377]

Investment, in itself, appears to be conceived as an activity in EU law, as a transfer of assets, or as the establishment of an undertaking; this definition is contrary to the international law asset-based perception of investment.[378] For example, in most bilateral investment treaties (BITs), the economic asset, which is to be considered as an investment is defined. Such definition includes assets '(…) that accompany an investment and make it possible in practice' in both the traditional form and new type of investment, such as shares, real estates, securities and portfolio investment.[379]

Moreover, there is a need to have a clear definition of the distinction between FDI and portfolio investment in the EU's investment policy. The reason is that the FDI has similar characteristics to the investment contractual rights in the BITs, which under EU law would be treated as services rather than capital movements.[380] The EU's external competences extend beyond issues of investment liberalisation. Only a few areas, covered by the BITs, remain under the shared competence.[381] The future international trade agreements would comprise investment provisions related to standards of investment protection, such as fair and equitable treatment, full security and protection treatment and expropriation issues; and in such agreements, an Investor-State Dispute Settlement (ISDS) mechanism would be also included.[382]

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[374] 2/15, Opinion of Singapore FTA (n 211), para. 80, Test Claimants in the FII Group Litigation; C-446/04, Test Claimants (n 373), para. 181 and 182; Judgment of the Court of Justice of 26 March 2009, *Commission of the European Communities v Italian Republic*, C-326/07, ECLI:EU:C:2009:193, para. 35.

[375] 2/15, Opinion of Singapore FTA (n 211), para. 94.

[376] Ibid, para. 85.

[377] Ibid, para. 107.

[378] Rubins, 'The Notion of "Investment" in International Investment Arbitration' (n 372), p. 292.

[379] European Commission, Communication Towards a Comprehensive European International Investment Policy (n 53), p. 8.

[380] The notion of services, as 'any kind of economic activities which are only temporarily provided for remuneration' (Article 57 TFEU) appears to exclude investments, since risk assumption and duration do not seem to be characteristics of services. Judgment of the Court of Justice of 27 September 1988, *Belgian State v René Humbel and Marie-Thérèse Edel*, C-263/86, ECLI:EU:C:1988:451, paras. 16-20.

[381] Angelos Dimopoulos, 'Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations' in Paul James Cardwell (ed), *EU External Relations Law & Policy in the Post-Lisbon Era* (T.M.C. Assser Press 2012), p. 408.

[382] European Commission, Proposal for a Regulation Framework for Screening of Foreign Direct Investments into the European Union (n 39), pp. 8-10.

In broader terms, one can conclude that direct investment is considered to aim at establishing lasting economic links and strategic long-term relationship. The direct investor would have a significant influence or control over the investment; normally, the investor would own at least 10% of the voting power.[383]

Another issue could be if one considers the scope of the FDI to be limited to regulation of market access and promotion of investment issues. It could additionally be possible to extend the competence so that it surrounds also the protection of investors and their investments.

Two different argumentations could be made in this regard. Firstly, Article 206 TFEU with the aim to contribute to '(…) the progressive abolition of restrictions on international trade and on foreign direct investment'. In turn, it would suggest '…that foreign direct investment is only part of the CCP as far as restrictions to foreign direct investment are concerned.'[384] Furthermore, it could be argued that such an approach would not be supported by Article 207(1).

Advocate General Sharpston further adds to the debate that market access limitations are 'merely one type of restriction', while other restrictions might, for example, result from '(…) discriminatory treatment; the lack of security, predictability and transparency in the regulation of international trade and foreign direct investment; or the existence of unfair trade practices'.[385] Secondly, in accordance with Article 345 TFEU, the Treaties '… shall in no way prejudice the rules in Member States governing the system of property ownership', and at least standards of protection against expropriation fall within Member States' competence.[386] AG Sharpston argues that that the EUSFTA does not infringe the Member States' exclusive competence to choose their system of property ownership.[387] This understanding goes similarly in line with the narrow reading of the provision in Article 345 TFEU by the CJEU.[388]

The reference to foreign direct investment in Article 207(1) TFEU lacks a proper definition. However, a reference to 'direct investment' can be found in Article 64(1) TFEU, and also in case-law. AG Sharpston's attempts to find a proper definition of the term direct investment. She states that foreign investments are:

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[383] Similarly, AG Sharpston considers that 'the fact that the direct investor owns at least 10% of the voting power of the direct investment enterprise may offer evidentiary guidance but is certainly not determinative', 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 322.

[384] Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?' (n 369), pp. 113-114.

[385] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 331.

[386] Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?' (n 369), p. 114.

[387] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 341.

[388] Judgment of the Court of Justice of 22 October 2013, *Essent and Others*, C-105/12 to C-107/12, ECLI:EU:C:2013:677 para. 36 and the case law cited.

> [I]nvestments made by natural or legal persons of a third State in the European Union and investments made by EU natural or legal persons in a third State which serve to establish or maintain lasting and direct links, in the form of effective participation in the company's management and control, between the person providing the investment and the company to which that investment is made available in order to carry out an economic activity.[389]

The most common types of FDIs are those referring to an investment made to acquire lasting interest in enterprises operating outside of the economy of the investor.[390] FDI competence is primarily concerned with market access, hence, allowing the EU to act with regard to the initial establishment of foreign investors.

In fact, investment protection is also present in the GATs including non-discrimination against the foreign service supplier,[391] transparency, due process and fair administration obligation. If the intent behind the expansion of the CCP was merely to cover rules of FDI, which were already covered by the GATs, the idea of expanding the CCP could be meaningless.

Whether expropriation should be considered to form part of the CCP has become a controversial question. The Commission intends to include provisions on the protection of foreign investment against expropriation and other political risks in future EU's international free trade agreements.[392] Article 345 TFEU provides that the EU Treaties shall not '(…) prejudice the rules of Member States governing the system of property ownership (…)'.

A strict reading of this provision would lead to that the property ownership system of the Member States excludes investment protection from the scope of EU's competence.[393] However, most scholars are not convinced by such.[394] Furthermore, as Eeckhout explains, the EU's case-law has repeatedly confirmed that this provision should not be read to restrict EU's competence.[395] Instead, the FDI, in Article 207 TFEU, should be read in broad manner and in

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[389] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 322.

[390] IMF International Monetary Fund, 'Making the Global World Work for All' (2007) Annual Report of the Executive Board <https://www.imf.org/en/Publications/AREB/Issues/2016/12/31/Annual-Report-of-the-Executive-Board-for-the-Financial-Year-Ended-April-30-2008> accessed 17 May 2018.

[391] Eeckhout, *EU External Relations Law* (n 260), p. 65.

[392] European Commission, Communication Towards a Comprehensive European International Investment Policy (n 53), pp. 8–9.

[393] Ceyssens, 'Towards a Common Foreign Investment Policy? Foreign Investment in the European Constitution' (n 370) p. 281.

[394] Shan, Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy' (n 9), p. 1067. Marc Bungenberg, 'The division of competences between the EU and its Member states in the area of investment policies' in Marc Bungenberg, Joern Griebel and Steffen Hindelang (eds), *International Investment Law and EU Law* (Springer 2011), p. 36 Dimopoulos, 'Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations' (n 381) p. 408.

[395] Eeckhout, *EU External Relations Law* (n 260), p. 65. World Trade Organization, Marrakesh Agreement Establishing the WTO

this sense also cover the protection of FDI against expropriation.[396] Perhaps, a broad asset-based definition of foreign investment would make it easier to negotiate with third countries.

1.2.2 Non-Direct Investment

It is not very clear whether and to what extent the provisions on capital movements, establishment and services confer implied powers to the EU with regard to the admission and treatment of non-FDI forms.[397] The FDI alone is subject to protection under international law.[398] Protection against foreign investment includes non-discrimination obligations, national treatment through establishing Most-Favoured-Nation (MFN), fair and equitable treatment standards, e.g., standards relating to due process and denial of justice, full protection and security, repatriation of profits, compensation for expropriation, and investor state dispute settlement.

Portfolio investment is more of short-term and speculative nature. The investors' influence on the management of the company also differs significantly from direct investment.[399] Taking these differences into consideration, it can be argued that the portfolio investment is not to be considered as an exclusive competence.[400]

This way, perhaps it was meant for the Member States to secure a certain level of their influence, as was accomplished in regard to external competence before the Lisbon Treaty.[401] The CJEU similarly held that 'the resolution of the issue of the allocation of competence could not depend on problems which might possibly arise in administration of the agreements concerned'.[402]

Whether portfolio investment should be regarded as shared or exclusive competence was disputed for a long time,[403] but has been clarified in Opinion 2/15. It seems to be of a general understanding that the investment protection should cover protections, which are dealt with in

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[396] Bungenberg, 'The division of competences between the EU and its Member states in the area of investment policies' (n 394), pp. 36-37, Shan, Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy' (n 9), pp. 1060-1061.

[397] Dimopoulos, *EU Foreign Investment Law* (n 92), Sections 2.3 and 2.4.

[398] M Sornarajah, *The International Law on Foreign Investment* (2nd edn edn, Cambridge University Press 2004), p. 8.

[399] European Commission, Communication Towards a Comprehensive European International Investment Policy (n 53), pp. 2-3.

[400] August Reinisch, 'The Division of Powers Between the EU and Its Member States "After Lisbon"' in Marc Bungenberg, Joern Griebel and Steffen Hindelang (eds), *International Investment Law and EU Law* (Springer 2011), pp. 106-7; Markus Krajewski, 'The Reform of the Common Commercial Policy' in Andrea Biondi, Piet Eeckhou and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012), p. 302; and Federico Ortino and Piet Eeckhout, 'Towards an EU Policy on Foreign Direct Investment' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (Oxford University Press 2012), p. 315.

[401] Articles 133(5) and (6) EC, introduced by the Nice Treaty, contained a special regime with regard to trade in services and commercial aspects of intellectual property, before the Lisbon Treaty led to the inclusion of both areas in the general regime in Article 207(1) TFEU.

[402] Opinion of the Court of Justice of 30 november 2009, *(Amendments to EU Schedules of Commitments under GATS)*, Opinion 1/08, EU:C:2009:739, para. 127; 1/94, Opinion on World Trade Organization Agreement (n 27), para. 107; 2/00, Opinion on Cartagena Protocol on Biosafety (n 321), para. 41.

[403] Ortino, Eeckhout, 'Towards an EU Policy on Foreign Direct Investment' (n 400), pp. 315-318.

the International Investment Agreements (IIAs).[404] A clear definition between these two concepts would not affect the FTAs as such, but rather the scope of protection given from these agreements, to which the European parliament is in favour.[405]

In terms of portfolio investment, the FDI is defined as the movement of money for the purpose of buying shares in a company formed or functioning in another country.[406] Portfolio investment covers, in contrast to FDI, short-term investments,[407] and is generally considered not to form part of the CCP.[408] The regulatory aspects concern the movement of capital, and the participation of foreign investors in the capital of the host state. For this reason, the EU's competence to regulate portfolio investment is based on the provisions on capital movements.[409]

It is not possible to exclude measures from the scope of the CCP just because they may have repercussions on certain economic sectors falling under the Treaty.[410] This type of FTAs does not only have effects on capital movements, but also on the liberalisation of trade. The clear difference between the two provisions is basically that only Article 207 TFEU provides explicitly for the conclusion of international agreements. Post signing an agreement, the similar problem can occur in relation to the treatment of EU's companies, as stipulated in Article 49 TFEU.[411]

The CJEU concluded that investment taking place in form of the acquisition of company securities, with the intention of making a financial investment and not to influence the management and control of the undertaking, such as portfolio investments, should constitute movements of capital for the purposes of Article 63 TFEU.[412] The AG Sharpston clarifies this point by considering that in addition to the acquisition of company securities, certain categories

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[404] Eeckhout, *EU External Relations Law* (n 260), p. 64; Leal-Arcas, 'The EU's New Common Commercial Policy after the Treaty of Lisbon' (n 301), p. 266.

[405] European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (n 98), para. 11.

[406] Sornarajah, *The International Law on Foreign Investment* (n 398), p. 7.

[407] European Commission, Communication Towards a Comprehensive European International Investment Policy (n 53), p. 3; European Parliament 'Report 28 June on a New Forward-looking and Innovative Future Strategy for Trade and Investment' 2016 2015/2105 <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2016-0220&language=EN> accessed 20 November 2016, para. 11.

[408] Eilmansberger, 'Bilateral Investment Treaties and EU Law' (n 368), p. 94.

[409] Woolcock, Kleinheisterkamp, 'The EU Approach to International Investment Policy After the Lisbon Treaty, Communication on Investment Policy' (n 96) pp. 10-11; Ceyssens, 'Towards a Common Foreign Investment Policy? Foreign Investment in the European Constitution' (n 370), p. 275; European Commission, Communication Towards a Comprehensive European International Investment Policy (n 53), p. 8.

[410] 1/78, Opinion on International Agreement on Natural Rubber (n 24), para. 49.

[411] Article 54 TFEU grants EU nationality to all firms having their registered office, central administration or principal place of business in the EU, regardless of whether they are owned or controlled by foreign nationals. Hence, Article 54 TFEU obliges the EU to treat foreign investors established in the territory of EU Member States as EU nationals.

[412] 2/15, Opinion of Singapore FTA (n 211), para. 227, The court makes further reference to earlier case law Judgment of the Court of Justice of 28 September 2006, *Commission of the European Communities v Kingdom of the Netherlands*, Joined cases C-282/04 and C-283/04, ECLI:EU:C:2006:608, para. 19; Judgment of the Court of Justice of 10 November 2011, *European Commission v Portuguese Republic*, C-212/09, ECLI:EU:C:2011:717, para. 47.

of real-estate investment or the use of loans are also investments involving capital movements or payments.[413]

The European investment policy communication has confirmed that the FDI should not be read as encompassing portfolio investment.[414] On the other hand, it would remain possible for the EU to imply its competence from the provisions on the free movement of capital.[415] In this regard, the question is whether such capital movement within FDI falls under Article 63 or Article 207 TFEU in relation to Article 3(2) on implied EU's competence.[416]

1.3 Limits to Exercise of Competence According to Article 207(6) TFEU

If competence is already established in relation to Article 207(1) TFEU, Article 207(6) TFEU concerns the exercise of such competences, i.e., the limits in regard to the FDI. Article 207(6) TFEU imposes two limits that will be discussed in the following section. The exercise of competences shall not affect the delimitation of competences between the Union and the Member States and shall not lead to harmonization of legislative or regulatory provisions of the Member States insofar as the Treaties. This is important to consider since a large interpretation of Article 207(6) TFEU can undermine its effective application.

1.3.1 The Delimitation between the EU and its Member States

The exercise of the competence cannot, in itself, affect the delimitation of competence between the EU and its Member States.[417]

Instead of stating that the EU has exclusive competence over all measures that may be adopted in order for the EU to perform its obligations resulting from international agreements, Article 207(2) TFEU states the legal basis to adopt '… the measures defining the framework for implementing the common commercial policy'. Just because the EU, according to Article 207(1), exercises its exclusive competence in relation to a specific agreement, for example the TRIPS, does not mean that the EU should have competence in all the different areas covered by that agreement in the internal market.

The first limitation should not therefore mean that the exercise of the EU's competence over the CCP depends on whether the EU enjoys internal competence on some other basis, and/

[413] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 367.

[414] European Commission, Communication Towards a Comprehensive European International Investment Policy (n 53), p. 8.

[415] Dimopoulos, 'Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations' (n 381), p. 405.

[416] This will be further discussed in the section below III-2 in relation to EU implied competence.

[417] Article 207(6) Consolidated Version of the Treaty of the Functioning of the European Unionreads 'The exercise of the competences conferred by this article in the field of the common commercial policy shall not affect the delamination of internal competences between the union and the Member States and shall not lead to harmonisation of legislative or regulatory provisions of Member States insofar as the treaties exclude such harmonisation.'

or in relation to whether they have exercised that competence.[418] Others may differently consider that the meaning and purpose of the first subparagraph of that provision is

> (…) very generally, to put the European Union's 'internal and external powers on a parallel footing and to prevent the European Union from entering into external commitments to which it would be unable to give effect internally for want of sufficient powers.[419]

The CCP may include trade in cultural and audio-visual, social, education and health services according to Article 207(4) TFEU; however, in the area of public health, for example, the EU's internal competence is limited.[420]

The most important question with regard to Article 207(6) is rather in relation to international investment law, since mainly substantive treatment standard provisions against expropriation would be excluded from the EU's competence.[421] The parallelism clause in Article 207(6) TFEU means that the lack of exercise of EU's internal competence limits the existence or the exercise of EU's external competence.

Another interpretation of Article 207(6) could be that it is possible to limit the internal, but not the external competence of the EU.[422] Consequently, the EU's external competence extends beyond the scope of the internal competence.[423] The interpretation that external competence may exist without a parallel internal competence would also be in line not only with the jurisprudence of the CJEU, but also Article 3(2) TFEU.[424]

1.3.2 Not-Harmonizing Legislative or Regulatory Provisions of the Member States

Article 207(6) TFEU provides for a second limitation to the exercise of competence under the CCP. It shall not affect the delimitation of competences between the EU and its Member States, and lead to harmonisation of legislative or regulatory provisions of the Member States, as the Treaties exclude such harmonisation. It further provides that the exercise of competences under the CCP cannot lead to harmonisation of legislative or regulatory provisions of the Member States insofar as the Treaties exclude such harmonisation. This goes in line with the

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418 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 109.

419 Opinion of Advocate General Kokott Judgment of the Court of Justice of 28 March 2009, *Commission v Council (Accession of Vietnam to WTO)*, C-13/07, ECLI:EU:C:2009:190, points 120-122 and 139-142.

420 Article 6 TFEU.

421 Ceyssens, 'Towards a Common Foreign Investment Policy? Foreign Investment in the European Constitution' (n 370), p. 259.

422 Markus Burgstaller, 'The Future of Bilateral Investment Treaties of EU Member States' in Marc Bungenberg, Joern Griebel and Steffen Hindelang (eds), *International Investment Law and EU Law* (Springer 2011), p. 65.

423 Judgment of the Court of Justice of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, C-22/70, ECLI:EU:C:1971:32; Opinion of the Court of Justice of 11 November 1975, *(Re-Understanding on a Local Cost Standard)*, 1/75, EU:C:1975:145.

424 Article 3(2) TFEU states The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

AG Kokott who pointed out that CCP's measures may lead to harmonisation of national legislation. However, harmonisation of national legislation may not give rise to an external competence to pursue an international trade and external action objectives, because of its different objectives.[425]

Such limitation does not mean that the CCP cannot cover matters that are precluded from harmonisation in other Treaty provisions, such as in matters of social policy, education, public health or culture.[426] The reason is that Article 207 TFEU should not be able to function for circumventing the prohibition of harmonisation under the Treaties. That limitation is thus, a particular application of the first limitation.

Article 345 TFEU states that measures based on this article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation. Taking it in relation to expropriation, it would not preserve exclusive power for the Member States to determine expropriation. The exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the EU. In relation to such objectives, it should not constitute a disproportionate and intolerable interference, since it would impair the very substance of the rights guaranteed.[427]

The CJEU interpreted Article 345 TFEU narrowly in order for the Member States not to be able to decide on the conditions under which an expropriation would take place.[428] In other words, there must be a reasonable relationship of proportionality between the means employed and aim sought to be realised.[429]

The CJEU applies a test where it considers more intensively the aim of the agreement but also the content, in comparison the AG Sharpston's approach. This test makes it possible to apply all the provisions in a more generous manner. It moreover applied a wider criterion than what has been done in the past in relation to the application of 'immediate and direct effects on trade'.[430]

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[425] Opinion of Advocate General Kokott Judgment of the Court of Justice of 22 October 2013, *European Commission v Council of the European Union*, C-137/12, ECLI:EU:C:2013:441, para. 66.

[426] Articles 153(2)(a), 165(4), 168(5) and 167(5) TFEU.

[427] Judgment of the Court of Justice of 20 January 2005, *Cristalina Salgado Alonso v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, C-306/03, ECLI:EU:C:2005:44, para. 22; Judgment of the Court of Justice of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA*, C-347/03, ECLI:EU:C:2005:285, para. 119; Judgment of the Court of Justice of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, paras. 358 and 360.

[428] Judgment of the Court of Justice of 24 September 1975, *J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft*, C-4/73, ECLI:EU:C:1975:114; Judgment of the Court of Justice of 30 July 1996, *Bosphorus v Minister for Transport, Energy and Communications and Others*, C-84/95 ECLI:EU:C:1996:312.

[429] Burgstaller, 'The Future of Bilateral Investment Treaties of EU Member States' (n 422), p. 65.

[430] 2/15, Opinion of Singapore FTA (n 211).

In earlier case-law, it was considered that the mere fact that an agreement may have implication for international trade is not enough for it to be fall within the CCP. It was thereafter decided that if it specifically related to international trade and is essentially intended to promote, facilitate or govern trade and constitute a direct and immediate effect on trade it should be considered to fall within the CCP.[431]

The EU's trade objective plays a large role. For example, the meaning of commercial aspects of intellectual property rights in *Daiichi Sankyo* was considered to be associated with the objective of the EU's external action to be an international trade actor. While the CCP measure may lead to harmonisation of internal provision, internal provisions can no longer be the legal basis of an international trade linked measure.[432]

2 The EU's Shared Competence for NGFTAs

It is important to clearly define the distinction between shared and exclusive EU competences. When identifying the shared competence, it is not only to identify the aspects which fall under shared competence by not being subject to exclusive competence but, it is in fact also necessary to identify the shared competence also by consider it relation to the subject matter and whether it falls entirely outside the EU competence.[433]

2.1 Definition of Shared Competence

Shared competence is defined as the Member States exercising their competence to the extent that the EU has not exercised its competence. If the EU cease to exercise its competence, the Member States can retake their actions to exercise the same competence[434] regarding certain subject matters, such as environmental policy,[435] in Article 4 TFEU. Article 2(5) TFEU introduces a third category of competences. It states

> '(…) the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas'. In matters falling under this category, the Union is allowed to

[431] Judgment of the Court of Justice of 18 July 2013, *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, C-414/11, ECLI:EU:C:2013:520, para. 51; 2/00, Opinion on Cartagena Protocol on Biosafety (n 321), para. 40; C-347/03, Giulia and ERSA (n 427), para. 75; and Judgment of the Court of Justice of 8 September 2009, *Commission of the European Communities v European Parliament and Council of the European Union*, C-411/06, ECLI:EU:C:2009:518, para. 71.

[432] Eleftheria Neframi, 'Vertical Division of Competences and the European Union's External Objectives' in Marise Cremona (ed), *The Court of Justice of the European Union and External Relations Law - Constitutional Challenges* (Bloomsbury Publishing 2014), p. 79.

[433] Dimopoulos, *EU Foreign Investment Law* (n 92), p. 76.

[434] Article 2(2) TFEU.

[435] Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' (n 249), p. 63.

pass legally binding acts. These, however, 'shall not entail harmonization of Member States' laws or regulations.'

Article 6 TFEU lists the following policy areas as supporting competences: the protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation. All matters not mentioned in the Treaty are sometimes called reserved competences or retained powers of the Member States.[436] In these areas, the Member States are in principle free to act, but must respect and not be in breach with EU law.[437]

Firstly, if shared competence exists in Article 4 TFEU, Article 216 TFEU comes into play to see whether one of the grounds listed there, allowing the EU's competence to enter into an international agreement, is satisfied. The combination of Article 4 TFEU and Article 216(1) TFEU creates the conditions that are necessary for applying shared competence.

Article 2(2) TFEU concerns the EU's right to pre-emption, which means that if the EU does not choose to exercise that right, both external and internal competence will remain within the competence of the Member States.[438] The Member States would then '(…) be competent to negotiate, sign and conclude an international agreement whose subject matter falls within that area of shared competence'.[439] Article 2(2) TFEU can be interpreted to mean that the EU is permitted to exercise its right to pre-emption in relation to both external and internal competences. However, it doesn't mean that the EU can, irrespective of whether it has chosen to exercise its competence or not, assert external competence over all area of shared competence in Article 4 TFEU.[440]

2.2 NGFTAS Covering Areas of Shared Competence

An international agreement which covers areas that fall within shared external competence and is later signed by the EU within external competence, is completely different than an agreement which, from start, only covers exclusive external competence. This is because to conclude an international agreement which covers areas that fall within the shared external competence, Member States should act in their capacity through their membership in

[436] Cristophe Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"' (2009) 2009/2 CLEER Working Papers <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224390/evidence-christophe-hillion-duty-of-cooperation.pdf> p. 21.Christoph Herrmann and Judith Crämer, 'Foreign Direct Investment - a Coincidental Competence of the EU?' (2015) 43 Hitotsubashi Journal of Law & Politics 85.

[437] Judgment of the Court of Justice of 14 January 1997, *The Queen, ex parte Centro-Com v HM Treasury and Bank of England*, C-124/95, ECLI:EU:C:1997:8, paras. 25 and 27.

[438] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 570, para. 61.

[439] Ibid, para. 73.

[440] Ibid, para. 73.

the Council. They have the authority to agree that the EU should exercise its sole power for external exclusive competence. An agreement signed by the EU and its Member States, both, the EU and its Member States are, as a matter of international law, parties to that agreement. In relation to the question of liability for a breach of the agreement and the right of action in respect of such a breach, the fact that both the EU and its Member States are parties to the agreement could have consequences. In this case, each Member State remains free under international law to terminate that agreement in accordance with whatever the appropriate termination procedure under the agreement is. The fact that the EU in these circumstances played a leading role in negotiating is irrelevant, because the Member States *per se* are viewed as sovereign state parties to the agreement, and not as an appendage of the EU.

The CJEU concludes in Opinion 2/15 that investment arbitration falls within a competence shared between the EU and the Member states.[441] The court reasons that this is the case because an investment arbitration system cannot be considered as an ancillary provision in these circumstances.[442] A provision of ancillary nature naturally means that such provision has no effect on the nature of the competence to conclude it. These provisions are considered a subgroup provisions and therefore fall within the same competence as the substantive provisions which they accompany.[443] The investment arbitration is, in essence is removing disputes from the jurisdiction of the court of the Member State, which cannot be considered to be of an ancillary nature and therefore leads to that it cannot be established without the Member States' consent.[444] This is because the claimant investor may decide to pursuant to Article 9.16 NGSFTA,[445] to submit the dispute to arbitration. The Member State, in this procedure is not being able to oppose this, as its consent in this regard is deemed to be obtained under Article 9.16.2 of the agreement.[446]

The dispute settlement regime in the EUSFTA being part is part of the institutional framework for the substantive provision of the agreement and is not liable to remove disputes from the jurisdiction of the court of Member State or the EU. This is because the of the EU's competence of the EU in the field of international concluded agreements with EU would entail a power to submit the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions. This has already been stated by

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441 2/15, Opinion of Singapore FTA (n 211), para. 293.

442 Ibid, para. 292

443 Opinion of the Court of Justice of 26 April 1977, *(Draft Agreement establishing a European laying-up fund for inland waterway vessels)*, 1/76, EU:C:1977:63, para. 5; 1/78, Opinion on International Agreement on Natural Rubber (n 24), para. 56; Judgment of the Court of Justice of 22 October 2013, *European Commission v Council of the European Union*, C-137/12, ECLI:EU:C:2013:675, para. 70 and 71.

444 2/15, Opinion of Singapore FTA (n 211), para. 292.

445 EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018).

446 2/15, Opinion of Singapore FTA (n 211), para. 291.

the CJEU in relation to the EEA agreement;[447] in relation to the Patent litigation system[448] and in relation to the agreements concerning the EU's accession to the ECHR.[449]

3 The EU's Implied and Exclusive External Competence for NGFTAs

The analysis of the EU's exclusive implied competence considers the agreements in relation to trade, i.e., whether they have immediate and direct effects on trade. This will be considered in relation to the areas which fall outside the CCP in order to establish whether (or which) provisions would be considered to be implied exclusive competences by virtue of Article 3(2) TFEU. Implied exclusive competence is assigned to the EU for the conclusion of an international agreement, when its conclusion is provided for in a legislative act of the EU, is necessary to enable the EU to exercise its internal competence or may affect common rules or alter their scope.

The implied powers were created by the CJEU in order to facilitate the possibility to regulate without using the competences established in Article 3 TFEU. It is meant to further ease and facilitate for the EU to negotiate international treaties. This implied competence is relied upon the internal competence provided in such area; in other words, the exercise of the competence. This section intends to analyse the limits of such implied competence. The EU is limited by its own internal procedure; and this procedure needs to be considered in relation to the objectives and competences in order for the EU to take decisions in relation to particular issues within the NGFTAs.[450]

The implied competence only applies to the extent that the matter, dealt with by the international act, falls, in Union law, under one of the shared competences' areas set out in Article 4(2) TFEU. For this reason, it is first of all necessary to define the policy area concerned by the agreement, and then consider that in relation to EU law and EU policy in that area. In this way, the agreement and the EU law must be analysed in relation to their main objectives.[451]

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[447] Opinion of the Court of Justice of 14 December 1991, *(European Economic Area EEA Agreement I)*, 1/91, EU:C:1991:490, paras 40 and 70.

[448] Opinion of the Court of Justice of 8 March 2011, *(European Patent Court)*, Opinion 1/09, EU:C:2011:123, para. 74.

[449] Opinion of the Court of Justice of 18 December 2014, *(Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms)*, 2/13, EU:C:2014:2454, para.182.

[450] Harrison, 'An Introduction to the Legal Framework for EU-Korea Relations' (n 78), p. 16.

[451] Erlbacher, 'Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty' (n 346).

Thereafter, it should be considered whether the content and nature of the specific area in the agreement are such that the EU common rules may be affected or altered in their scope.[452]

What falls within the scope of implied external competence is an ongoing discussion between the Council and Commission. The CJEU gave some clarification in regard to this in its opinion in relation to the EUSFTA.[453] According to Article 3(2), the EU enjoys implied external exclusive competence in situations where the EU does not have express exclusive competence in relation to Article 3(1) TFEU. Unlike Article 3(1) TFEU, Article 3(2) TFEU concerns external competence alone. There are three situations[454] where the EU is exclusively competent to conclude an international agreement, '(…) when its conclusion is provided for in a legislative act of the EU', '(…) when its conclusion is necessary to enable the union to exercise its internal competence', and '(…) insofar as its conclusion may affect common rules or alter their scope'.[455]

To have the right internal policies remains one of the big challenges under the questions of competence and within the legal framework of the EU. This reflects the external competitive challenges, and also maintains the openness to trade and investment. It additionally ensures greater openness and fair rules underpinned by transparent and effective rules, domestic, bilateral and multilateral. In particular, this is important in regard to future major trading partners. It is clear that foreign direct investment is within the EU's exclusive competence. However, when it comes to non-direct investment and ISDS, the question of competence was answered by the CJEU. The CJEU put it as that the EU should enjoy exclusive competence pursuant to Article 3(2) TFEU, since the Treaty provisions on free movement of capital would be affected by the EUSFTAS.

The CJEU has, post-Lisbon, interpreted the EU's external implied competence quite restrictively in *Broadcasting Organisation.*[456]

Through the changes and reforms of the Lisbon Treaty, it could be argued that shared external competences no longer exist *per se*. This is because the codification of the EU competence did not include shared external competence unless specifically provided for in individual matters. Consequently, it would imply that they do not exist in relation to either a test of facilitation or by any other rule.[457]

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[452] Article 3(2) Consolidated Version of the Treaty of the Functioning of the European Union.

[453] 2/15, Opinion of Singapore FTA (n 211).

[454] The three situations for the EU to conclude an agreement are in addition to the situations set out in Article 3(1) TFEU, discussed in chapter II.

[455] Article 3(2) Consolidated Version of the Treaty of the Functioning of the European Union.

[456] C-114/12, Commission v Council, (n 339).

[457] Robert Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis' (2008) 33 European Law Review 709, p. 714; Marise Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty' (2006) 2006/30 European University Institute Law Working Paper

However, it could instead be argued that a general shared external competence exists based on the provisions of the Lisbon Treaty, through the difference in wording between Article 3(2) and Article 216(1) TFEU; although Article 216(1) does not specify the exclusive or non-exclusive nature of the competences that it confers, while Article 3(2), through a first reading, could suggest that Article 216(1) is corresponding to the exclusive competences.[458]

In situations where the EU has the power to conclude an international agreement according to Article 216 TFEU, such power stems from four different situations: when the Treaties so provide; when an agreement is necessary within the framework of the EU's policies to achieve an EU's objective, when it is provided for in a legally binding EU act, or when it is likely to affect common rules or alter their scope.

It may be possible in theory to envisage cases that do not fit into these four categories, but the reality is that one or more of these categories will legitimate the making of an international agreement in the post-Lisbon Treaty world. The breadth of the second category is worthy to note. Provided that it can be shown that the agreement was necessary, it can be made so in order to achieve a Union objective within the framework of Union policy. Thus, an international agreement could be made to effectuate one of the broad objectives in Article 3 TEU or Article 21 TEU, within the context of any Union policy.

The link between Article 216 TFEU and Article 3(2) TFEU is significant. Article 216 is concerned with whether the EU has competence to conclude an international agreement; and Article 3(2) deals with the related, but distinct, issue as to whether competence is exclusive or not.

However, in this regard, when external competence is conferred and where the conclusion of an agreement is 'necessary' to fulfil objectives of the Treaties, this could relate to both, exclusive and shared external competences.[459]

This codification could be read as a double necessity standard, where either exclusive or non-exclusive competence would be applied.[460] The case-law, such as the *Lugano* Opinion on implied shared competence, has only referred to necessity and not facilitation. However, it could be possible to argue for facilitation on this basis. This case-law, prior to the Lisbon Treaty, could be analogously interpreting the wordings of Article 216 TFEU. It could also be possible

<http://cadmus.eui.eu/bitstream/handle/1814/6293/LAW_2006-30.pdf?sequence=1&isAllowed=y> accessed 20 November 2016., pp. 10-11.

458 Klamert, *The Principle of Loyalty in EU Law* (n 248).

459 Paul Craig, *The Lisbon Treaty: law, politics, and treaty reform* (Oxford University Press 2013), p. 400.

460 Dapo Akade, 'International Organizations' in Malcolm D Evans (ed), *International Law* (Oxford University Press 2014), In public international law, the doctrine of implied power are similarly used. Such powers are implied whenever they are essential for the fulfilment of an organization's objects and purposes. The power to be implied cannot be indispensably required.

to approach this problem by arguing that in specific cases, the intention of the drafters of the Treaty was to make all implied competences explicit. The reasons are that the *Lugano* Opinion has been given by the CJEU, the case-law on this issue was not conclusive, and the codification would be difficult because nothing can be said with certainty.[461]

3.1 Competence Enabling Exercise of Internal Competence

Exclusivity is established when an international agreement '(…) is necessary to enable the Union to exercise its internal competence', which is a codification of Opinion 1/76. This principle basically establishes that the EU has exclusive competence to conclude international agreements in situations where its powers for passing internal measures cannot be exercised without such international action.[462] The case concerned the conclusion of an agreement on a scheme for the elimination of disturbances for navigation on the Rhine. The power itself flows from the implication of the provisions of the Treaty, which create the internal power; and for international scope, it is necessary for the attainment of the objective of such powers to be reached within the EU.[463] The CJEU found it necessary for the EU to enter into such agreement autonomously, because the arrangement included also Switzerland as a third state.[464] The necessity test was introduced by the CJEU.[465] Article 216(1) TFEU put the necessity criterion different by referring to the necessity of achieving one of the Treaties' objectives instead.[466]

The Court thereafter rendered its judgement in *ERTA* and *Kramer* and held that:

> (…) the Court has concluded inter alia that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion. (…)

The power to bind the Community *vis-à-vis* third countries nevertheless flows, by implication from the provisions of the Treaty creating the internal power, and insofar as the

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[461] Marcus Klamert and Niklas Maydell, 'Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law' (2008) 13 European Foreign Affairs Review 493.

[462] 1/76, Opinion establishing a European laying-up fund for inland waterway vessels (n 443), para. 2: 'In this case, however, it is impossible fully to attain the objective pursued by means of the establishment of common rules pursuant to Article 75 of the Treaty, because of the traditional participation of vessels from a third state, Switzerland, in navigation by the principal waterways in question, which are subject to the system of freedom of navigation established by international agreements of long standing'.

[463] Ibid., paras. 3-4.

[464] The participation of several Member States was only due to the special circumstances of the case.

[465] Klamert, Maydell, 'Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law' (n 461), p. 493.

[466] Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' (n 249), p. 56–57, Cremona argues that the valid argument is to refer to Treaty objectives in general instead of to the internal market competence since referring to the internal market competence could lead to extend the scope of external competence.

participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community. Transport policy, which was the concern of the case, led it to be considered implied exclusive external competence.[467]

The CJEU has mentioned certain conditions for this kind of exclusivity, requiring an inextricable link between internal policy objectives and international agreements.[468] The test of necessity cannot be compared to the EU's proportionality test, as used within the internal market.[469] The reason hereto is that the proportionality principle is related to the EU's act against alternative measures to see whether it can be considered as appropriate and indispensable.[470]

Shared competence must in this sense be conditional on certain criteria; in other words, the principle of complementarity.[471] This is because the competence is not automatically generated for the EU when it has internal competence to enact directives or regulations.[472] The requirement for implied shared competence would be, on the other hand, linked to an internal competence.[473]

Thus, the pertinent requirement for implied shared competences has to be attached to the nature of an internal competence. For example, in relation to international agreements, the EU is exclusively competent to conclude such agreements. For this reason, the only way an EU's objective can be attained would be through exclusive competence; however, when the participation would merely facilitate the exercise of an internal competence, it is to be argued as shared competence. In order to be an implied shared competence, it requires that the obligations of the EU *vis-à-vis* third States would further the attainment of one or more of its internal competences.[474]

This test is based on the same theory as the necessity criterion element within exclusive external competence, as introduced in the Opinion 1/76. In other words, it is the necessity test that provokes the EU's exclusive competence, even in the circumstances of shared competence. Through Opinion 1/76 or Article 352 TFEU, the necessity criterion aims to reconcile the

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467 C-22/70, Commission v Council (n 423), in this case it shows the requirement in order to establish exclusivity.

468 1/94, Opinion on World Trade Organization Agreement (n 27), para. 87; Judgment of the Court of Justice of 5 November 2002, *Commission of the European Communities v Kingdom of Denmark*, C-467/98, ECLI:EU:C:2002:625, para. 56.

469 Robert Schütze, 'Parallel External Powers in the European Community: From Cubist Perspectives towards Naturalist Constitutional Principles?' (2004) 23 Yearbook of European Law 225, p. 239.

470 Koen Lenaerts and Piet van Nuffel, *Constitutional law of the European Union* (Sweet & Maxwell 2005), pp. 109-115.

471 Alan Dashwood and Joni Heliskoski, 'The Classic Authorities Revisited' in Alan Dashwood and Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet and Maxwell 2000), pp. 127-136.

472 Article 114 Consolidated Version of the Treaty of the Functioning of the European Union.

473 This conclusion would go in line with the 1/76, Opinion establishing a European laying-up fund for inland waterway vessels (n 443).

474 Dashwood, Heliskoski, 'The Classic Authorities Revisited' (n 471), pp. 3-19 They seem to read the (early) case law only as providing for the 'lower' standard of necessity to establish an implied shared competence.

implied competence of the EU's external action, while still interpreting the Treaties effectively.[475]

The question of the necessity is understood when there is an inextricable link, which requires and leaves no other option for the EU to act externally in order for it to be able to fulfil its tasks internally.[476] The standard of facilitation and its exact scope are not made clear, and remain, for this reason, an open question in relation to implied shared competence.

The threshold, in order for it to be considered as a necessity, is very high, and this has resulted in that the external competence was denied. Firstly, it should be a close link to the internal competence. However, such link would not need to be indispensable. Secondly, the test of facilitation should be guided by the principle of effectives, as rooted in the 'effect utile' of the internal power that requires external action for it to be effectively exercised. In order to be able to view whether it could be regarded as an effective measure of assessment on whether the internal competence would be further analysed.[477]

3.2 Competence Stemming from a Legislative Act

According to Article 3(2) TFEU and the first ground of this provision, the EU shall have exclusive competence '(…) when its conclusion is provided for in a legislative act of the Union'.[478]

The reason behind this rule has been expressed by the case-law of the CJEU. In this regard, there may be situations where the Treaties themselves do not establish an external competence of the EU to conclude internal agreement, but that common rules laid down by the institutions can establish such competence.[479]

Enabling Member States to conclude their own international agreements in these situations would be liable to jeopardise concerted external action in the spheres covered by those EU rules;[480] the EU, therefore, acquires exclusive competence as a result of common rules.[481]

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[475] van Vooren, Wessel, *EU External Relations Law Text, Cases and Materials* (n 149), p. 93.

[476] Marise Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and Effects of International Law' (2006) No 2006/22 EUI Working Paper Law <http://cadmus.eui.eu/bitstream/handle/1814/6249/LAW-2006-22.pdf?sequence=1&isAllowed=y> accessed 20 Novwember 2016., p. 3, suggests that in Opinion 1/03 this test has been relaxed again by the ECJ.

[477] Lenaerts, van Nuffel, *Constitutional law of the European Union* (n 470), p. 858.

[478] Piet Eeckhout, *External relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press 2004), p. 99.

[479] Judgment of the Court of Justice of 5 November 2002, *Commission of the European Communities v Federal Republic of Germany*, C-476/98, ECLI:EU:C:2002:631, para. 109.

[480] Opinion of the Court of Justice of 7 February 2006, *(Lugano Convention)*, 1/03, EU:C:2006:81, paras. 45, 121, and 122.

[481] C-476/98, Commission v Germany (n 497), para. 109.

The first ground of Article 3(2) TFEU is called the WTO principle. This is because the rule was made in the CJEU's Opinion 1/94.[482] In this case, it was concluded that the EU acquires exclusive external competence when the '(…) the Community has concluded in its internal legislative acts' provisions relating to the treatment of nationals of non-member countries or expressly conferred on the institutions powers to negotiate with non-member countries'.[483]

In this regard, one could reason that '(…) the Lisbon Treaty would opt against the theory of legislative pre-emption and in favour of subsequent constitutional exclusivity in the external sphere (...)'.[484] This is considered to be an important difference between the powers, conferred by the Treaty, and the powers that the EU acquires as a result of the passing legislative acts. Furthermore, if the EU could empower itself with exclusive competences, the WTO's principle would consequently undermine the constitutional division of powers of the EU.[485] This principle is indeed a way for the EU to acquire exclusive external competence; however, its implications depend on its interpretation.

Firstly, it would be possible to interpret this provision in a narrow way, thereby not really establishing a fundamental difference between the *ERTA* principle and the WTO principles, in the case where it would be a substantive relation between the internal and external content of the rule in question. In this regard, it should not be compared to external competences expressly conferred by the Treaty and consequently, it should not provide a threat to the constitutional division of powers.[486] Because this is in line with the *ERTA* principle, the EU could acquire exclusive competence by virtue of any form of internal legislation. This should apply a *fortiori* when they already contain an 'international' element regarding the treatment of third-country nationals, or when the EU's instruments are more specific on the external mandate of the EU's institutions. An example is *ERTA* case, where a regulation had provided for a treaty-making negotiating mandate, but only for the scope of the international agreements in question.[487]

Secondly, Article 3(2) TFEU can be interpreted to speak very shortly about exclusive competence when it '(...) is provided for in a legislative act of the Union'. This would mean that when the EU regulates on a matter, such matter could lead the EU to have the power to

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[482] 1/94, Opinion on World Trade Organization Agreement (n 27).

[483] Ibid. para. 95. Eeckhout, *External relations of the European Union: Legal and Constitutional Foundations* (n 478), p. 99.

[484] Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis' (n 457), p. 713.

[485] Ibid.

[486] Ibid.

[487] C-22/70, Commission v Council (n 423), paras. 28-29: "Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force, on 25 March 1969, of Regulation No. 543/69 of the Council on the harmonization of certain social legislation relating to road transport necessarily ... vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that Regulation." "This grant of power is moreover expressly recognized by Article 3 of the said Regulation which prescribes that: The Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this Regulation".

negotiate with a third state. However, there is no case law on the precise meaning of the WTO's principle before the Lisbon Treaty. By looking at Article 3(2) TFEU from a narrow perspective, anything else would, in a fundamental manner, run counter to the principle of conferral.[488]

3.3 Competence Affecting Common Rules or Altering their Scope

In relation to the third ground of Article 3(2) TFEU, the EU enjoys exclusive competence to conclude an international agreement '(…) insofar as its conclusion may affect common rules or alter their scope'. This ground corresponds to the *ERTA* case-law for defining '(…) the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions, where common EU rules have been promulgated for the attainment of the objectives of the Treaty'.[489]

The *ERTA* principle gives a basis for the EU to enjoy implied exclusive competence through appropriate measures, and for the Member States to fulfil their obligations under the Treaties and their duty to abstain from measures capable of jeopardising the attainment of the objectives of the Treaties.[490]

In this regard, the exclusive external competence is for the situation, where there is a risk that the Member States, acting outside the EU, would affect the common rules or alter their scope. The reason is that otherwise, the implementation of EU's policies and also the integration process would be questioned. In fact, there must be a specific analysis of the relationship between the proposed international agreement and EU law in relation to exclusive competence.[491] Such analysis contains three different steps i.e. defining the subject matter, identifying existing common rules, and also the possibility to impact the conclusion of international agreement

3.3.1 Definition of Subject Matter

Defining the area or the subject matter of the agreement is regarded as the first step of the analysis. This is considered by looking at the content and objective of the agreement. In this regard, not all agreements are homogenous; there are certain agreements which cover larger areas. In such cases, there is a need to verify whether the EU rules fully harmonised, or whether the EU largely covers these areas.[492] The question is whether the common rules constitute rules

[488] Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' (n 249), p. 57.

[489] C-114/12, Commission v Council (n 339), para. 66.

[490] C-22/70, Commission v Council (n 423), para. 21. The obligations established in this case are enshrined in Article 4(3) TEU in the second and third subparagraphs.

[491] C-114/12, Commission v Council (n 339), para. 75.

[492] 3/15, AG Wahl in Opinion on Marrakesh Treaty to Facilitate Access to Published Works for Disabled Persons (n 364), paras. 137-154. Thus, such methodology could be applied to the Convention of the Council of Europe on the protection of the rights of broadcasting organisations.

already adopted in the exercise of the EU's legislative competences, or whether the Treaty provisions can also constitute 'common rules'.

3.3.2 Identification of Existing Common Rules

Identifying whether the common rules already exist in the area is the second step in this analysis. The scopes of international agreements and common rules need not to fully coincide;[493] it could be sufficient that the area of the international agreement is largely covered by the common rules.[494] The common rules may include legislation that is applicable to the specific area, and also legislation that has a broader scope of application.[495] The common rules can be also found in different legal instruments,[496] and not only in situations involving a non-EU element.

The CJEU states that when the EU adopts provisions to lay down common rules, the Member States can no longer act, individually or collectively, to undertake obligations with third states that may affect this type of rules.[497]

It has been further made clear that for such analysis, one should not only take the current state of EU law into account, but also its future development insofar as it would be foreseeable at the time of analysis.[498] Moreover, this was confirmed in Opinion 1/13.[499] For example, in *Green Network*, the CJEU ruled that even though the EU had not regulated on the specific issue (the support schemes for electricity produced from renewable energy sources), the Commission was required to submit, within a limited time period, "(…) a report on experience gained with the application and coexistence of the different national support mechanisms, accompanied, if necessary, by a proposal for a Community framework with regard to those support schemes for electricity produced from renewable energy, specifying in that respect various criteria such a framework should meet".[500] "Without making this very explicit, the Court was manifestly guided (and rightly so) by the idea that unilateral international action of Member States could

[493] C-114/12, Commission v Council (n 339), para. 69, and the case-law cited, and of 26 November 2014, Judgment of the Court of Justice of 26 November 2014, *Green Network SpA v Autorità per l'energia elettrica e il gas*, C-66/13, ECLI:EU:C:2014:2399, para. 30. That step in the analysis distinguishes the test under Article 3(2) TFEU from the identification of areas 'pre-empted' by EU action under shared competences.

[494] C-114/12, Commission v Council (n 339), para. 70, C-66/13, Green Network (n 493) para. 31.

[495] C-114/12, Commission v Council (n 339), para. 81.

[496] Ibid., para. 82.

[497] C-22/70, Commission v Council (n 423), para. 17.

[498] 1/03, Opinion Establishing Lugano Convention (n 480), para. 126.

[499] 1/13, Opinion on International Child Abduction (n 338), para. 74; C-66/13, Green Network (n 493), para. 33; C-114/12, Commission v Council (n 339), para. 70.

[500] C-66/13, Green Network, Green Network (n 493), para. 62.

jeopardise foreseeable future development of Union law. It is with this objective in mind that the unavoidable grey areas need to be addressed on a case-by-case basis".[501]

In Opinion 2/15, the CJEU concluded that when an agreement provides for the application of rules which, to a large extent, overlap with the common EU rules, the agreement may affect or alter the scope of the common rules.[502] In this regard, international agreements' provisions that essentially affect the common rules are likely to satisfy the conditions for exclusive competence.

3.3.3 Possibility to Impact the Conclusion of International Agreement

To analyse the possible impact of the conclusion of the international agreement on the relevant common rules is the third step. A risk exists where the commitments under the international agreement fall within the scope of the common rules.[503] When assessing the impact, it is sufficient to show that the common rules may be affected, or that their scope may be altered,[504] and not necessarily the conflict itself between the international agreement and common rules.[505]

It is in fact easy to establish the exclusive competence for concluding international agreements where the common rules fully harmonise the area governed by the international agreement.[506] In cases where the common rules are only harmonised partially, the fact that an international agreement concerns are largely covered by EU rules does not by itself automatically lead to that the EU acquires exclusive competence for the entire agreement. The *ERTA* principles do not automatically apply in these circumstances and must therefore be examined because everything depends on the content of the commitments and its specific connection to EU rules.[507]

Protocol no. 25 concerns the exercise of shared competence; Article 2(2) TFEU defines the scope of the EU's competence only to cover those elements governed by the EU to act in that regard, and therefore, it does not cover the whole area. The scope of Article 3(2) TFEU can therefore not be limited by the protocol.[508]

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[501] Erlbacher, 'Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty' (n 346), p. 28.

[502] 2/15, Opinion of Singapore FTA (n 211), para. 201. This was discussed in relation to the rail transport services supplied in the EUSFTA which come under a regime governing access and establishment that will cover the same matters as the regime established by Directive 2012/34, para. 200.

[503] C-114/12, Commission v Council (n 339), para. 68

[504] Ibid., para. 68.

[505] Ibid., para. 71.

[506] 1/94, Opinion on World Trade Organization Agreement (n 27), para. 96.

[507] C-114/12, Commission v Council (n 339), paras. 104-111.

[508] Ibid., para. 73.

Portfolio investment is similar to such activity since it does not require managerial control. Consequently, portfolio investment would as well remain outside the scope of the CCP. The question is whether it is possible for EU to enjoy either shared or exclusive competence in relation to portfolio investment. The Commission has argued that the Treaty provision on capital and payments should be read together with the third ground of Article 3(2) TFEU. From this reading, insofar as it may affect the common rules or alter their scope, the implied external competence should be exclusive for the EU in relation to portfolio investment. The Commission would need '(...) to provide evidence to establish the exclusive nature of the external competence of the EU on which it seeks to rely'. The argument put forward by the Commission is essentially that the investment policy should be consistent with the Treaty provisions on capital and payment.

In principle, the Commission claims that all restrictions on payments and capital movements, including those that involve direct as well as portfolio investment between Member States themselves, and between Member States and third countries would be considered prohibited. The Commission furthermore claims that such prohibition should be '(…) to the extent that international agreements on investment affect the scope of the common rules set by the Treaty's Chapter on capital and payments, the exclusive EU competence to conclude agreements in this area would be implied'. In this regard, the Commission argues that portfolio investment should be an implied exclusive competence for the EU.

However, many have questioned this statement by the Commission, since it would be contrary to EU's external competence. For example, it would be '(…) difficult to see on what basis the EU could claim a general competence to conclude international agreements on the protection of portfolio investment'. This statement is based on that Articles 64(2) and 66 TFEU provide the EU with substantive competences in the field of portfolio investment. Through reading these provisions, it can be concluded that they 'clearly do not cover all aspects of such investment'. It could also be because Article 63 TFEU covers the movement of capital between Member States and third countries.

Moreover, if the FDI and portfolio investment had existed as exclusive implied powers prior to Lisbon Treaty, it would have been strictly unnecessary to include them into Article 207(1) TFEU.

The Commission means that by reading Article 3(2) TFEU from a more creative perspective, one could suggest that 'common rules' in the absence of secondary legislation also include Treaty provisions. If that would be the case, then, Article 3(2) together with Article 63(1) would mean that the EU enjoys exclusive competence over portfolio investment.

This creative proposition by the Commission was rejected by AG Sharpston, who argued that the *ERTA* and subsequent case-law made '(…) clear that the Commission's broad interpretation of 'common rules' cannot be accepted'. Such interpretation cannot be possible since Article 3(2) TFEU provides the EU with an addition ground of exclusive competence, not covered by Article 3(1). For this reason, the competence '(…) must therefore stem from some other basis than the Treaties themselves'.

Since Articles 63(1) and 64(2) TFEU are not linked to any secondary legislation, there is no 'common rules', and the requirement from Article 3(2) cannot be met. The Commission's interpretation of Article 3(2) TFEU would in fact imply that the EU has the right to conclude agreements that affect the Treaties or alter their scope, but EU primary law '… can be changed only by amending the Treaties in accordance with Art 48 TEU', as argued by AG Sharpston.

Portfolio investment represents major area of interest since the EU's explicit competence is limited to foreign direct investment, according to Article 207 TFEU. Following the mainstream view in the literature, it means that it would be necessary for the Member State to be contracting party to an agreement with portfolio investment included. The fact that Article 207 TFEU covers foreign direct investment does not automatically lead to the conclusion that the EU's competence should be limited to foreign direct investment, since it would contradict the entire implied shared competences, which have not been terminated or modified by the Lisbon Treaty. In fact, whether this would be the case, or whether the mainstream literature would prevail, mainly depends on the interpretation of the free movement of capital in a third-country context.[509]

Following the reason of free movement of capital provisions as already granting access and treatment standards for third countries and EU investors through a restrictive approach of the CJEU, would provide the EU with exclusive competence to determine the condition of access to and post-access treatment of foreign direct investment in the NGFTAs.[510]

It is important to clarify the portfolio investment. Non-direct foreign investment, which would take place in form of acquisition of company securities with the intention of making financial investment without any intention to influence the management and control of the undertaking, is considered movement of capital for the purpose of Article 63 TFEU.[511]

The CJEU determines whether portfolio investment should be considered to be within exclusive competence pursuant to Article 3(2) in relation to the EUSFTA. The CJEU argues

[509] Burgstaller, 'The Future of Bilateral Investment Treaties of EU Member States' (n 422), p. 24.

[510] Ibid., p. 26.

[511] 2/15, Opinion of Singapore FTA (n 211), para. 227; Joined cases C-282/04 and C-283/04, Commission v Netherlands (n 412), para. 19; C-212/09, Commission v Portugal (n 412), para. 47.

that even if there is no contradiction with common EU rules.[512] Chapter 9 of the EUSFTA may affect Article 63 TFEU and should for this reason fall within the exclusive competence of the EU according to Article 3(2) TFEU.[513]

4 Framework and Objectives Guiding the CCP

The 'New Generation' of FTAs is subordinated to the EU's trade policy, and to a wide range of the EU's objectives.[514] Whether an agreement fall within the CCP needs to be presented through showing that the different components of the agreements are intended to promote, facilitate or govern trade. It should moreover be considered whether the agreements have a direct and immediate effect on trade.[515] It must thereafter also be shown whether the components of the agreement show commitments which are intended to promote facilitate or govern trade and more over have a direct and immediate effect on it.[516]

The NGFTAs are broad in content and can therefore carry multiple related or unrelated components and purposes. This type of objectives may or may not be within the CCP objectives. The NGFTAs include commitments such as market access, investment protection, intellectual property protection, competition and sustainable development.

The interaction between the CCP and other principles and objectives of the EU's external action is expressly recognised in the final sentence of Article 207(1) TFEU. According to Article 206 TFEU, the '(...) union shall contribute, in the common interests to the harmonious development of the world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'.

When the EU acts internationally, regardless through which competence, and whether it stems from internal or external objectives, it is the action itself which is regarded as the EU's external action.[517] The action itself is guided through different objectives.

The Lisbon Treaty creates a common framework for EU's external action, in relation to Articles 3(5) and 21 TEU; thus, subjecting all fields of the EU's external action to the same common general principles and objectives. Article 21 TEU does not in itself confer competence to the EU but may, through its list of general objectives, give a more global approach to the

[512] 1/03, Opinion Establishing Lugano Convention (n 480), paras. 143, 151-153; 1/13, Opinion on International Child Abduction (n 338), paras. 84-90; C-66/13, Green Network (n 493), paras. 48, 49.

[513] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 229.

[514] Gstöhl, Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context'; European Commission External Trade 'Global Europe Competing in the World' (n 3), p. 735.

[515] 2/15, Opinion of Singapore FTA (n 211), para. 37.

[516] Ibid., para. 38.

[517] Note here the difference between the use of terminology, 'action' is in difference to 'external relations' a reflection of the more integrated and dynamic approach.

EU's external action. These principles are to guide the EU's external actions and promote them in a wider world.

It is clearly indicated that the principles and objectives of Article 21 TEU are not limited to specific external competence but apply to all EU's competences. For this reason, one can consider Article 21 TEU to provide a guiding framework for the exercise of EU's external competence.[518]

Substantive specific objectives correspond to specific external action competences conferred to the EU in part C of the TFEU. The objective to promote an international system based on TFEU's stronger multilateral cooperation and good global governance is not linked to a specific competence of the EU.

When defining the EU's exclusive competence objectives, it is natural to, first of all, determine the underlying objectives of the CCP in respect to its trade liberalisation objectives and non-trade objectives. This in order to be able to see whether there is a clash between the different objectives and whether in fact, the objectives can contribute to limiting the EU's external action.

In this regard, it is important to analyse whether or which area that can be subsumed under the obligations of Article 207 TFEU as provisions which are affecting international trade in a more or less 'direct and immediate' manner. The indication of the legal basis is essential in the light of the principle of conferral, since the choice of an appropriate legal basis has a constitutional significance.[519]

4.1 The Principle of Conferral

The EU can only act within the limits of the competences conferred upon it according to the principle of conferral laid down in Article 5(1) and (2) TEU. The competences in the Treaties are conferred competences from the Member States to the EU.

The principle of conferral links the EU's external competence to the EU's objectives.[520] This becomes a core constitutional issue that underscores the division of competence between the EU and its Member States. The Member States have conferred parts of their competence to the EU in order for the latter to be able to legislate in various areas of policy and economic activity.

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[518] Eleftheria Neframi, 'Commentaire de l'Article 21 TUE' in Olivier Dubos and Sébastien Platon (eds), *Commentaire du Traité sur l'Union Européenne* (in press 2018).

[519] Judgment of the Court of Justice of 25 October 2017, *European Commission v Council of the European Union (CMR-15)*, C-687/15, ECLI:EU:C:2017:803, paras 48 and 49; C-600/14, Germany v Council (n 311), para. 80.

[520] Article 5, para. 1, of the Treaty on the European Union (TEU): 'Under the principle of conferral, the Union s hall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out there in'.

It determines that the EU shall act only within the limits of the competences, conferred upon it by its Member States, in the Treaties to attain the objectives set out therein, and that the powers which are not given to the EU remain with its Member States.[521] In this regard, the principle helps to provide a more desired balance between the EU and its Member States.[522]

The idea of conferring competences is based on the attempt to strike the balance between the EU as a supra national authority, and its Member States. In this regard, it is of specific importance that the division of competences is clear, since it may have implications for the exercise of external competence.[523] The CJEU carries out the function of assuring that the vertical division of competences between the EU and its Member States is correctly established through the constitutional principle of conferral.[524]

This competence is therefore relative to the principle of conferral, which means that the EU is only competent to conclude agreements in the field where it has acquired such competence by the Member States to do so.[525] Additionally, the exclusive competence doesn't allow Member States to act in parallel, and it distinguishes the EU from other intergovernmental organisations.[526] The Treaties, however, do not clarify all aspects of division of competence between the EU and its Member States. Nevertheless, Opinion 2/15 provided some needed clarity in this context which will be further discussed in this chapter.

4.2 Trade Liberalisation Objective

Article 21.2(a-g) TEU covers substantive and specific external action objectives and an objective, which could be considered as general or ultimate under Article 21.2(h) to '(…) promote an international system based on stronger multilateral cooperation and good global governance'. While the EU shall contribute with common interest to harmonious development of world trade and the progressive abolition of restriction on international trade and on foreign direct investment.[527] This provision reflects the 'liberalisation objective'. To consider the wording in a more detailed manner, one can distinguish the obligation in the wording of the provision that the EU 'shall' contribute to international trade. In other words, the EU is bound

[521] Article 5(1-2), TEU.

[522] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 57.

[523] Ibid.

[524] Neframi, 'Vertical Division of Competences and the European Union's External Objectives' (n 431), p. 79.

[525] Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, signed on 13 December 2007 [2007] OJ C 83/335 "The Conference confirms that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties".

[526] Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Hart Publishing 2012), pp. 15-17.

[527] Article 206 TFEU.

to formulate the CCP for it to provide positive effects on trade and foreign direct investment liberalisation.[528]

Article 206 TFEU shows the relationship between the internal customs union and the objective to reach to a more global level. For this reason, the CCP is constructed to have a core based on exclusive competence. The development of trade has shifted from the Member States to the EU. Article 206 TFEU refers to the EU and mentions international trade and also foreign direct investment as forming part of the CCP.

Article 206 TFEU offers also a different role to the objective of liberalisation in the field of the CCP. Within this context, it is necessary to examine how the Lisbon Treaty affects the application of the principles of uniformity and liberalisation, the importance of the general objectives for the CCP, and the mechanisms it provides for ensuring coherence and consistency.

There is a possibility of overlaps between the NGFTAs and already existing agreements. This provides an increased difficulty to a clear gateway. The key word for the legal framework is therefore cooperation. Cooperation can be viewed in the way of balancing various policy goals, where certain provision can be found in both, the framework agreement[529] and the FTA;[530] for example, the concept of sustainable development, which guides the parties to achieve coherence in their bilateral relations.

When trying to protect certain industries or consumers, the meaning of progressive abolition of restriction is not always clear. The EU is very active in making disputes at the WTO level; for this reason, it is possible to draw the conclusion that the EU is not a social trade giant but rather active in dispute litigation.[531]

The purpose of the EU's trade policy was never linked to protectionism; on the contrary, restrictive measures adopted towards third countries should always promote liberalisation of trade, such as the objectives of GATT 1947. The references to the progressive abolition of restrictions and the lowering of customs barriers date back to the text of the Treaty of Rome. At the time, they constituted an acknowledgement of trade liberalisation as one of the main principles underpinning the creation of the common market. They also served as a reminder that the common market is subject to the rules of GATT 1947, and, in particular, that the establishment of a customs union is an exception to the free trade imperatives set out under

[528] Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 European Foreign Affairs Review 153, p. 160.

[529] Framework Agreement Between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part, Article 1(3). In this article the parties reaffirm their commitment to promoting sustainable development in all its dimensions.

[530] EU-Korea FTA Chapter 13.

[531] Andrés Delgado Casteleiro and Joris Larik, ' The "Odd Couple" - The Responsibility of the EU at the WTO' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union - European and International Perspectives* (Hart Publishing 2013), p. 238.

GATT and is therefore only allowed under the very restrictive conditions of Article XXIV GATT 1947. Alongside the objective of trade liberalisation, the CCP shall be conducted in the context of the principles and objectives of the EU's external action according to Article 207(1) TFEU.

However, if there was no such protectionism, and the EU would continue to promote liberalisation to trade, there would be no trade restrictive measures adopted against third countries. This was decided in the *EMI*,[532] where the CJEU pointed out that the liberalisation objective does not extend to third countries.

The CJEU furthermore states that the objective of trade liberalisation could be subjugated to inherently internal interests of the EU.[533] However, this case can be questioned after the changes promoted by the Lisbon Treaty, because of the liberalisation objective in that the EU 'shall contribute' to trade liberalisation according to Article 207 TFEU.

Such change can suggest a more of a binding obligation, which is at the same time considered to be of a gradual nature in Article 206 TFEU. This perhaps suggests the obligation to gradually move towards liberalisation, where the minimum would be the maintenance of the existing level of liberalisation.[534] Naturally, this would preclude introducing new protectionism measures in form of trade restrictions. There is no obligation to *per se* liberalise trade with third countries, but at the same time, promoting trade liberalisation should be understood as a collective effort on the international stage. This means that the EU is merely under an obligation to promote, through authorizing, increased liberalisation when negotiation trade agreements.[535]

This further shows that trade liberalisation is not a goal in itself, but rather a mean to achieve improvements for economic, social, and environmental conditions. This can be showed by the EU's aim to '(…) foster the sustainable economic, social and environmental development of developing countries with the aim of eradicating poverty.'[536] The EU's external trade provisions cannot be read in isolation, and all provisions need to be considered as the EU's external trade provision as a whole; where the EU should encourage the integration of all countries into the world economy through the progressive abolition of restrictions on

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[532] Judgment of the Court of Justice of 15 June 1976, *EMI Records v CBS United Kingdom*, C-51/75, ECLI:EU:C:1976:85, para. 17. "…the provisions of the Treaty on commercial policy do not, in Article 110 et seq., lay down any obligation on the part of the Member States to extend to trade with third countries the binding principles governing the free movement of goods between Member States and in particular the prohibition of measures having an effect equivalent to quantitative restrictions". This was furthermore confirmed by the Polidor case; Judgment of the Court of Justice of 9 February 1982, *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited*, C-270/80, ECLI:EU:C:1982:43.

[533] Judgment of the Court of Justice of 5 May 1981, *Firma Anton Dürbeck v Hauptzollamt Frankfurt am Main-Flughafen*, C-112/80, ECLI:EU:C:1981:94.

[534] Dimopoulos, *EU Foreign Investment Law* (n 92), p. 1611.

[535] Article 206 TFEU.

[536] Article 21(d) ibid.

international trade.[537] It is clear that the drafters of the Treaty, when amending Article 206 TFEU, aimed to provide a new dimension of trade liberalisation providing the liberalisation objectives as a declaratory; putting more emphasis on the political importance of the economic integration, whether at multilateral, regional, or bilateral level, for the EU.

4.2.1 Primacy of Trade Liberalisation with Regard to Other Trade Objectives

Article 206 TFEU states that the CCP shall contribute to trade liberalisation, whereas Article 207 TFEU states that the CCP '(…) shall be conducted in the context of the general objectives of the Union external action'. The language used in relation to trade liberalisation, 'shall contribute', is stronger than the language used for the general objectives, 'shall be conducted in the context of', making it possible to argue the primacy of trade liberalisation over other non-trade objectives.

Moreover, although it seems unlikely that the EU institutions would ever countenance the notion that trade liberalisation can override such fundamental interests, like those of security, democracy and the rule of law in practice, some contend that Article 21 TEU does not actually list legally binding objectives, but rather well-meaning – although ultimately toothless – declarations reflecting the various objectives of the EU, that it should strive to pursue in the context of its foreign policy.[538]

On the other hand, it is worth considering that it is not uncommon for national constitutions to include foreign policy objectives, which whilst leaving executive branches a significant margin of discretion as to how to achieve such objectives, at least require a best endeavour obligation to pursue them.[539]

4.2.2 Sustainable, Economic, Social, and Environmental Development

It is not possible for the CCP to be limited to only encompassing measures, which pursue commercial objectives. Article 21 TEU shows that such subjects include a wide range of objectives ranging from political and social to environmental and economic. In this sense, not all objectives are purely commercial, such as development,[540] foreign and security policy,[541] or

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[537] Article 21(e) ibid.

[538] Alan Dashwood and others, *Wyett and Dashwood's European Union Law* (6th edn edn, Oxford University Press 2011), p. 903.

[539] Joris Larik, 'Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law' (2011) 2011/5 CLEER Working Papers <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1963235> accessed 20 July 2017., p. 23.

[540] 1/78, Opinion on International Agreement on Natural Rubber (n 24), paras. 41 to 46.

[541] Judgment of the Court of Justice of 17 October 1995, *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany*, C-70/94, ECLI:EU:C:1995:328, paras. 10, and 17, Judgment of the Court of Justice of 17 October 1995, *Criminal proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, C-83/94, ECLI:EU:C:1995:329, para. 11.

the protection of the environment or human health,[542] but they still have direct and immediate effects on trade.

The EU is seeking for cooperation to continue, preserve, and improve the quality of the environment and sustainable management of global natural resources. This is indicated in Article 21.2(f) TFEU,[543] stating that the EU should work to help develop international measures. The emphasis is put on the environmental aspects, and the term 'sustainable development' is not further explained. 'International measure' is another term, that is also not further explained by the Treaty. International measure could mean measures made by instruments in cooperative practice, such as bilateral or multilateral instruments; for example, the NGFTAs. It could also be interpreted in a wider manner to also include unilateral actions of the EU, such as restrictions, or taxes for environmental purposes. For this reason, one can conclude that the EU is able to proceed to take unilateral action to ensure sustainable development, but at the same time respect international law, and its bilateral and multilateral commitments.

The EU has to ensure a strict consistency between the areas in its external action and other policies. The consistency requirement is reinforced by institutional cooperation. The requirement of consistency stemming from Article 21 is repeated in Articles 205 and 207 TFEU.[544] The link between EU's external action and the principles and objectives is stressed again in Article 207 TFEU.[545]

The fact that the CCP is subordinated to the general principles and objectives of external relations, including the sustainable development, is not questioned. The issues of conflict between the CCP and objectives and principles in relation to trade liberalisation objectives are sometimes very difficult to reconcile with other principles and objectives of the EU. One of the conflicts could be between trade and environment. The abolition of trade barriers could lead to damaging effects in the field of trade, and also in other fields, such as social policy or environment.

The environmental protection requirement in Article 6 TFEU[546] is established on a coordinated, parallel-like relation to trade. Depending on the 'substance', it could have different

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[542] Judgment of the Court of Justice of 29 March 1990, *Hellenic Republic v Council of the European Communities*, C-62/88, ECLI:EU:C:1990:153 paras. 17-20; 2/00, Opinion on Cartagena Protocol on Biosafety (n 321), para. 40, 3/15, AG Wahl in Opinion on Marrakesh Treaty to Facilitate Access to Published Works for Disabled Persons (n 364), para. 69.

[543] Article 21.2 (f) TFEU, reads '(...) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'.

[544] Article 205 TFEU.

[545] Article 207 TFEU, 'The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.

[546] Article 6 TFEU, Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities [...] in particular with a view to promoting sustainable development.

impacts in relation to different policy areas. This naturally means that measures, which are detrimental to the sustainable development, cannot be adopted in the CCP. Because of these requirements of coherence, the potential conflicts between abolition of trade barriers and environmental concerns, including the sustainable development, can be solved.[547]

4.2.3 Progressive Abolition of Restriction on International Trade

In spite of the fact that the ultimate aim of the KOREU agreement, as an example, is free movement of goods, customs duties are not abolished at once. The majority of duties are eliminated with the entry into force of the Treaty; however, the FTA provides for a phase-in period during which the tariffs that were exempted from immediate liberalisation are gradually reduced until they are fully removed.[548]

The parties have set out base rates, which are rates of customs duties applicable at the moment of entry into force of the agreement.[549] Thereafter, annual steps are applicable for reducing the applicable rates until they are fully abolished. The annual percentage of reduction varies according to the respective category of products.

For some products, trade is liberalised immediately. The full abolition of duties on highly sensitive goods, in particular agricultural products, requires the phase-in period.[550] In this regard, the determination of the actual applicable duty and amount of time scheduled is noted until full liberalisation takes place. It requires that there will be an examination of the base rate, and identification of the category that the respective product is listed within.

The different phase-in periods are used to grant the concerned sectors enough time for structural adjustments in order to diminish the social costs of liberalisation. A slower or gradual liberalisation could therefore help limiting labour market adjustment. In the EU, this is particularly used in the automotive sector, while in Korea, the agricultural product sector is primarily considered.[551]

The FTA does not provide the possibility of introducing new tariffs, complementing the elimination of existing duties, nor enacting any new duties.[552] These two mechanisms ensure the permanent abolition of tariff barriers between Korea and the EU.

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[547] Balazs Horvathy, 'Sustainable Development and Common Commercial Policy' (2012) 53 Acta Juridica Hungarica 334, pp. 341-342.

[548] EU-Korea FTA Article 2(5)(1).

[549] Ibid. If a party should unilaterally reduce its MFN-tariff, after the entry into force of an agreement, that rate shall apply as the base rate. Article 2(5)(3).

[550] Ibid. Annex 2-A, paras 1(a) and (1).

[551] European Commission Services Position Paper 'Trade, Sustainability Impact Assessment of the Free Trade Agreement Between the EU and The Republic of Korea' 2010 <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146324.pdf> accessed 15 June 2018.

[552] EU-Korea FTA, Article 2(6).

Non-tariff barriers were among the main concerns identified in the Commission's Global Europe communication, which initiated the shift towards bilateralism, and identified Korea as a priority FTA partner.[553] Reducing tariffs remains important to opening markets for industrial and agricultural exports.

In line with this statement, the provisions on domestic regulatory measures in the KOREU are considered to be the agreement's main innovation in terms of rule development in the field of trade in goods.[554] While the FTA incorporates Article III of the GATT 1994[555] on national treatment and reaffirms the signatories' rights and obligations under the agreement on the Technical Barriers to Trade (TBT),[556] it goes well beyond the WTO obligations of the parties. The reason for the presence of additional provisions on TBT is that national treatment may solve the problem of overtly discriminatory, and thus, protectionist regulation. The national discipline is not well equipped to address these specific difficulties.

The good faith of market fragmentation is not tackled by the non-discrimination. Regulatory measures are normally put in place in order to pursue legitimate policy objectives, such as addressing information asymmetries, negative externalities and so forth without any protectionist motivation. Although legitimate, these measures may have the effect of increasing transaction costs and, thus de facto, ban products from the market. This is especially the case when producers are faced with the costs of having two conformity assessment procedures, one in their home country and another in the export market. To overcome this problem, there are three basic alternatives: (1) states may opt for some weak form of policed decentralisation, based on transparency and notification requirements, (2) states may opt for the harmonisation of their standards, and (3) states may also choose the mutual recognition of their respective domestic regulations.[557]

It is often difficult to ascertain the regulatory intent behind a measure in practice; however, it is the key to determining whether the measure should be allowed or condemned under international trade law. Despite the fact that non-protectionist regulation may also have the effect of excluding foreign products from domestic markets, this is acceptable because it is globally efficient as long as the measure is not a protectionist proposal. In other words,

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[553] European Commission, 'Europe in the World — Some Practical Proposals for Greater Coherence, Effectiveness and Visibility Communication from the Commission to the European Council, (Communication Europe in the World, 2006)' COM (2006) 278 final; Rigod, 'Global Europe: The EU's New Trade Policy in its Legal Context' (n 74), pp. 277-306.

[554] Colin M Brown, 'The European Union and Regional Trade Agreements: A Case Study of the EU-Korea FTA.' in Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law* (Springer 2011), p. 301.

[555] EU-Korea FTA, Article 2.8.

[556] Ibid., Article 4.1.

[557] Alan O. Sykes, 'The Limited Role of Regulatory Harmonisation in Internal Goods and Services Markets' (1999) 2 Journal of International Economic Law , p. 5.

regulatory measures should be allowed as long as they are not enacted. Subsequently, as to afford protection to domestic producers,[558] any regulation of standards must strike a balance between inhibiting such protectionist measures and not interfering with states regulatory autonomy to adopt necessary and legitimate domestic measures.

The additional disciplines in the KOREU should be understood against this background. On the one hand, they are proxies to ascertain regulatory intent, serving to distinguish protectionist motivated regulation from measures that were promulgated in good faith and pursuing legitimate goals. On the other hand, they address the problem of *bona fide* market fragmentation by reducing transaction costs for exporters through different mechanisms such as the recognition of foreign standards and conformity assessment, and the alignment of regulations on the basis of international standards.

4.2.4 Technical Barriers to Trade

Technical barriers to trade may result in mandatory technical regulations or voluntary standards specifying the characteristics of the products, as well as the conformity assessment requirements for certifying products in compliance with the relevant regulatory scheme.[559] In contrast to EU's previous FTAs, the annexes of the KOREU contain detailed rules on regulatory measures in four different sectors: Consumer electronics, motor vehicles and parts, chemicals and pharmaceutical products. The approaches toward the four sectors differ, ranging from harmonisation on the basis of international standards of mutual recognition to enhanced transparency requirements.

In the case of consumer electronics, the parties principally agreed to base their domestic regulation on international standards established by the International Organisation for Standardisation, the International Electrotechnical Commission, and the International Telecommunication Union.[560] In general, this is the common rule except when a relevant international standard does not exist, or where one of the parties decides to deviate from the international standard for legitimate reasons, such as safety or other public interest requirements.[561] After implementing such rules, the domestic regulation of the EU and Korea should be very similar, and would therefore ease cross-border trade.

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[558] Gene M Grossman, Henrik Horn and Petros C Mavroidis, 'National Treatment' in Henrik Horn and Petros C Mavroidis (eds), *Legal and Economic Principles of World Trade Law* (Cambridge University Press 2013), p. 210.

[559] The respective terms are legally defined in Annex 1(1), (2) and (3) of the TBT agreement.

[560] EU-Korea FTA, Annex 2-B, Article 2(2).

[561] Ibid, Annex 2-B, Footnote 2.

Furthermore, Korea also accepts supplier declarations of conformity for the majority of products[562] after a transitional period.[563] This means that the EU's producers are exempted from conducting conformity assessment in Korea and should, thus, further reduce the costs of exporting to Korea, instead of requiring third-party certification.[564]

However, certain standards could be viewed as regulatory obstacles to trade in automotive products that are tackled through partial alignment of standards.[565] This is also done through partial recognition of the other parties' standards.[566] Korea and the EU explicitly spelled out which specific standards they would recognise as equivalent to their products to the individual markets and can, therefore, fully exploit the resulting economies of scale. The aim of this provision is to present the erosion of market access concessions through the conclusion of subsequent and more favourable FTAs with third parties. Finally, the annex is subject to special dispute settlement rules. Disputes concerning motor vehicles and parts thereof shall always be considered as a matter of urgency, and in comparison, to ordinary dispute settlement proceedings, time periods concerning consultations, panel proceedings and compliance with rulings are shortened accordingly.[567]

With regard to pharmaceutical products and medical devices, the KOREU focuses on two specific issues. Firstly, for cases in which reimbursement is determined by government agencies, the FTA provides for rules ensuring that pricing and reimbursements are fair, transparent and non-discriminatory.[568] In particular, manufacturers shall have the opportunity to apply for price adjustments.[569] It means that they have a right to demand higher prices, and shall have the right to be heard before any *ex officio* price adjustment by the competent authority.[570] Secondly, the Annex 2D of the FTA contains specific transparency requirements for domestic measures, which affect reimbursements or pricing.[571] However, these provisions do not provide widely coverage. The least ambitious rules are those concerning chemicals. The relevant annex contains little more than a list of several duties to strive for cooperation.[572]

[562] European Commission DGTrade 'The EU-Korea Free Trade Agreement in Practice' (n 16). pp. 8-10.
[563] EU-Korea FTA, Annex 2-B, Articles 3-4.
[564] In emergency cases either party may still require party certification; for more information, ibid, Annex 2-B, Article 6.
[565] Ibid, Annex 2-C, Article 3(a)(iii).
[566] Ibid, Annex 2-C, Article 3(a)(i)(ii).
[567] Ibid, Annex 2-C, Article 10.
[568] Ibid, Annex 2-D, Article 2 (a).
[569] Ibid, Annex 2-D, Article 2 (b)(i)-(iv).
[570] Ibid, Annex 2-D, Article 2 (b)(v).
[571] Ibid, Annex 2-D, Article 3.
[572] Ibid, Annex 2-E.

Various sector-specific working groups and committees established under the FTA aim at further elimination of barriers to trade and are set up through cooperation and consultation[573] for all four sectors, not only to promote common rules development, but also prevent trade conflicts before they arise. To that end, the parties are committed to inform each other about any measure that affects trade and consult on such matters with a view to arrive at mutually satisfactory outcomes.[574]

The sector specific rules in the KOREU raise an interesting question in relation to WTO law. Given that the mutual recognition under the agreement is limited to the FTA parties, the relevant FTA provisions may be the Most Favoured Nation obligation under WTO law, which prohibits any differentiation between products on the basis of origin.[575] To this end, it is not clear whether WTO law allows limiting recognition to only some WTO members without extending it to others, where the same conditions prevail.[576]

It is doubtful whether the provisions could pass under Article XXIV GATT necessity test as established by the appellant body in Turkey textiles.[577] Provisions in a preferential trade agreement, which are in conflict with GATT obligations can be justified, if they are necessary to form the preferential arrangement. In the event, that the special TBT rules would not be present the parties would inevitably be prevented from establishing the FTA is, at the very least, questionable.

Finally, the TBT chapter provides for an interesting mechanism, aimed at diminishing the trade restrictiveness of technical barriers on the side of the EU. Upon notifying Korea that the EU Member States' measure is not in compliance with the EU legislation, the EU authorities make their best endeavours to address the issue in a timely manner.[578] This provision is geared to its Member States and reflects Korea's worries concerning variations in Member States' legislation, which would potentially result in obstacles to trade. Therefore, the KOREU extends Korea's right to a certain extent, in that it allows not only to claim non-compliance with the FTA, but also non-consistency of domestic legislation with the TFEU. The underlying assumption is that a measure which is not hindering trade between the EU Member States does not impede trade between the EU and Korea. This is sensible given the broad definition of a

[573] Debra P. Steger, 'Institutions for regulatory cooperation in "New Generation" economic and trade agreements' (2012) 39 Legal Issues Of Economic Integration 109, pp. 109-126.

[574] EU-Korea FTA, Annex 2-C, Article 9. The mechanism appears to work quite well. For example, after consultations with the EU Korea adopted adjustments to a regulation on CO2 emissions and fuel efficiency.

[575] GATT 1994, Article I.

[576] Joel P Trachtman, 'The Limits of PTAs: WTO Legal Restrictions on the Use of WTOPlus Standards Regulation in PTAs' in Kyle W Bagwell and Petros C Mavroidis (eds), *Preferential Trade Agreements: A Law and Economic Analysis* (Cambridge University Press 2011), p. 117.

[577] Turkey — Restrictions on Imports of Textile and Clothing Products [1999] WT/DS34/AB/R, para. 58.

[578] EU-Korea FTA, Article 4.4(3).

measure having an equivalent effect to a quantitative restriction, pursuant to Article 34 of the TFEU,[579] which goes beyond the requirements set out in the FTA. It is hardly imaginable, but of course possible, that a measure which would not be considered as a trade hindrance in intra-EU trade could present an obstacle to EU–Korea commerce.

In the EUSFTA, the TBT and SPM are measures laid down in order to permit each other to apply its technical and sanitary standards. This should be in accordance with the WTO rules. This type of rules is intended to reduce barriers that may result from these actions. Such rules facilitate trade in the sense that it clarifies the standards which the other party need to apply to and make sure that such standards are not discriminatory or disproportionate compared with those that are applied to its own products. This type of standardised rules is intended to facilitate trade in goods between the parties and was considered by the CJEU in the case of Opinion 2/15 to have direct and immediate effects on international trade. Consequently, these fall within the exclusive competence of the European Union pursuant to Article 3(1)(e) TFEU.[580]

4.3 Non-Trade Objectives

The proliferation of treaty-recognized objectives for the CCP does have its problems. The Lisbon Treaty does not institute a hierarchy between the general objectives of the EU's external action, meaning that one cannot discount the very real possibility that conflicts would arise between different objectives.

Whilst the general assumption seems to be that the objectives and principles of Article 21 TEU are broad enough to fall within the margin of appreciation of the EU's institutions,[581] one could easily envisage a conflict where, for example, a trade policy measure adopted by the EU pursuing one of the general objectives listed in Article 21 TEU, would adversely affect existing levels of trade liberalisation with third countries. This would be problematic if the Court was to accept that the principle of trade liberalisation, as currently formulated, is mandatory since the Treaty's language does not provide any meaningful guidance as to how to resolve the conflict between contradictory policy objectives. It has even been posted in this regard that where the pursuance of a non-trade objective leads to a trade-restrictive measure, such measure should only be permitted to the extent that it passes a proportionality test, whereby it is demonstrated that the measure is required in order to achieve the non-trade objective, and that it does not exceed what is necessary to achieve said objectives.[582]

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[579] Judgment of the Court of Justice of 11 July 1974, *Procureur du Roi v Benoît and Gustave Dassonville*, C-8/74, ECLI:EU:C:1974:82, para. 5.

[580] 2/15, Opinion of Singapore FTA (n 211), paras. 44-45

[581] Dimopoulos, *EU Foreign Investment Law* (n 92), p. 166; Krajewski, 'The Reform of the Common Commercial Policy' (n 400), p. 298.

[582] Dimopoulos, *EU Foreign Investment Law* (n 92), p. 166.

The fact that non-trade objectives are now to be incorporated in the CCP should not come as a surprise since the EU's external trade policy has been long used as a tool to achieve goals that are not necessarily trade specific. For example, the CJEU has long accepted development objectives to be part of the CCP. These include successive EU regulations applying schemes of general systems of preferences and the cooperation agreements concluded with developing nations, where the primarily aim is development cooperation. Because of the ever-evolving international trade system, this type of agreements was considered compatible with Article 110 TFEU, to the extent that an overly restrictive interpretation of the purposes for which the CCP could be used would render it useless.[583] In this sense, the Lisbon Treaty is merely formalizing practice that is already well established with the references to support democracy, the rule of law, human rights and environmental development to provide an unambiguous legal basis for trade conditionality.[584]

According to Article 207 TFEU, what to be included into the CCP are areas in relation to the EU's internal or external actions, which specifically relate to international trade.[585] In this regard, it concerns international trade with third member countries, and not trade within the internal market. Furthermore, in relation to international trade, it is essentially intended to promote, facilitate or govern trade, and has direct and immediate effects on trade, which in turn means that it does not concern trade within the internal market.[586]

For this reason, the purpose of each agreement is of importance to consider. In fact, if the purpose of the agreements was to extend beyond the territory of the EU, then the agreement would be presumed to seek the promotion of international trade, and fall within the CCP, because the approximation of law of the Member States would have largely been achieved by the EU's secondary legislation in the internal market.[587] However, in cases where the approximation is the object of the agreement, the purpose would automatically be to improve the functioning of the internal market, and fall outside the CCP, even if it has effects on international trade.[588]

International trade in goods and services cannot be viewed in isolation from many of the regulatory challenges that confront governments. International trade liberalisation relies on the regulatory environment and creates its own externalities that in turn call for regulatory

[583] Billy A Melo Araujo, *The EU Deep Trade Agenda: Law and Policy* (Oxford University Press 2016), p. 64.

[584] Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty' (n 457), p. 30.

[585] C-414/11, Daiichi Sankyo (n 431), para. 50, and of 22 October 2013, C-137/12, Commission v Council (n 443), para. 56.

[586] C-414/11, Daiichi Sankyo (n 431), paras. 51 and 52 C-137/12, Commission v Council (n 443), paras. 57 and 58.

[587] C-137/12, Commission v Council (n 443), para. 67.

[588] 1/94, Opinion on World Trade Organization Agreement (n 27) paras. 44 and 45 (concerning services) and paras. 59 and 60 (concerning intellectual property rights).

responses. In this particular setting, it would be possible for cooperation between the corresponding states in order to improve regulatory outcomes that will facilitate trade liberalisation, and address the externalities associated with it.[589]

4.3.1 Objectives without Assigned Powers

Article 21 (2) TEU establishes the objectives without assigning its necessary powers. It does not allocate external competence but serves as a framework for the exercise of such powers. The overall approach to the external action objectives determines the scope of Article 21(2) TEU and must be respected by the EU when exercising its competence in its external action. Moreover, it must be pursued in parallel to the EU's internal objectives, which gives rise to external action by the EU.

The assumption that the Lisbon Treaty has or has not conferred normative value to the various external action objectives listed in the Treaty is one that is contested,[590] and that shall remain unverified unless a challenge is brought before the Court. Nevertheless, the fact remains that Article 21 TEU was included in the Treaty, and the language of this provision suggests that '(…) the Union shall define and pursue common policies and actions'[591] that it imposes some form of obligation on the EU. By stating that the CCP must be conducted in the context of these objectives, Article 206 TFEU indicated that at the very least, the CCP must conform to an overarching external policy framework.

This makes sense when viewed in light of the abolition of the pillar structure which separates the supranational economic community from intergovernmental policy areas of the Common Foreign and Security Policy (CFSP) and justice and home affairs, from the emergence of a de-pillarized EU. The Lisbon Treaty sought to acknowledge the need for a unified external policy by listing all EU's objectives in a single provision, and by requiring that the EU ensures '(…) consistency between the different areas of its external action and between these and its other policies'.[592] The concept of the consistency, which is referred to in a number of occasions in EU Treaties, is the key to understanding how the EU must conduct its various external policies. Consistency is understood as entailing not only an obligation to ensure the removal of contradiction between different external policy areas of the EU, but it also means that efforts should be made to develop policies of mutually reinforcing act that create synergies.[593]

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[589] Epps, 'Regulatory Cooperation and Free Trade Agreements' (n 63), p. 142.

[590] Marise Cremona, 'Coherence in EU Foreign Relations Law' in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Publishing 2011), pp. 90-91.

[591] Article 21(2) TEU.

[592] Article 21(3) ibid.

[593] Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona and others (eds), *Developments in EU External Relations Law* (Oxford University Press 2009), pp. 12-17.

To promote such consistency, the Treaty of Lisbon creates most of the high representative of the EU's foreign security policy, which occupies simultaneously the role of the high representative of the CFSP, vice-president of the Commission, and Commissioner for external relations. Subsequently, it seeks to bridge the gap between the different external policies of the EU.[594]

In this sense, Article 207 TFEU calls to conduct the CCP in the context of the general objectives of the EU's external action is a reminder that the EU's trade policy may not be carried out in a vacuum, and that at an operational level, the EU must take steps to ensure that trade policy considers other external policy areas by not undermining and, if possible, furthering the objectives pursued in these policy areas.

4.3.2 Safeguard Values, Fundamental Interests, Independency, and Integrity

According to some aspects of Article 21 TEU, the EU shall define and pursue common policies and actions, and shall cooperate in the fields of international relations in order to safeguard its values, fundamental interests, independency and integrity.[595] It should also encourage the integration of all countries into the world economy through the progressive abolition of restrictions on international trade.[596] In other words, a new transatlantic partnership has to be based on solid ground. In this regard, to achieve a solid ground, the principle of loyal cooperation could be regarded as a 'master key' that gives a more effective external representation of the EU.[597] 'Vertical coherence' means that not only EU's policies but also the individual level of the Member States could fear that the EU's external principles and objectives will be too widely interpreted in order to find a convergence with the US principles and values. The proposed agreement and its objective, therefore, have to be consistent with the EU *acquis* and Member States' legislation, and shall not affect the ability of the EU and the US to develop policies, according to the directives for negotiation on the TTIP that was declassified.[598]

The EU is a working process in the external relations, and also within the EU itself with the work directed towards a single voice and unity in order to reach a more effective partnership with external partners.[599] In fact, the unity of international representation of the EU is merely

[594] Article 18(4) TEU.

[595] Article 21(a), ibid.

[596] Article 21(e), ibid.

[597] C-246/07, Commission v Sweden (n 321), para. 37.

[598] C-433/03, Commission v Germany (n 333), paras. 60 and 66.

[599] Daniel S Hamilton and Frances G Burwell, 'Shoulder to Shoulder: Forging a Strategic U.S.-EU Partnership' (2010) Center for Transatlantic Relations Johns Hopkins University <http://streitcouncil.org/uploads/PDF/ShouldertoShoulder.pdf> accessed 16 April 2018., p. 12.

an expression of the duty of cooperation, and therefore, the unity of internal representation of the EU and its Member States does not have an independent value.[600]

4.4 Balancing Conflicting Objectives

The EU's credibility rests on what it can achieve unilaterally. In other words, it requires a consistency between internal practices and external objectives, and constant checking of the EU's set of projection on its own internal goals and deficits.[601] Article 21(1) TEU reflects Articles 2 and 4 TEU, which set out principles or values underpinning all EU's activities.[602] It lays down the underlying principles governing the EU's external action at the international level through the list of objectives which the EU should take into consideration when carrying out its common policies and actions in all areas of its external relations. Uniformity therefore holds its character as an instrumental principle of the CCP, providing a link between the exercise of internal powers and the type of external commercial measures. The EU's external policy should be used as a tool for this type of free trade agreements. This should be accomplished through the strength of the internal market and its regulatory framework, in order to liberalise the market.[603]

The complexity can be shown by considering the founding values of the EU, such as the respect of equality, the rule of law, the respect for human rights, and the principle of non-discrimination in Article 2 TEU. Furthermore, the EU should uphold and promote its values and interests and contribute to the protection of its citizens. At the same time, the EU shall also contribute to 'free and fair trade' and 'strict observance and the development of international law', according to Article 3(5) TEU. Furthermore, it is the EU's ambition to support '(…) the rule of law, human rights and the principles of international law' in Article 21 TEU,[604] which provides the guiding framework for the EU's external action and is applicable to the EU's trade policy that is necessary for the EU to consider when concluding international agreements.[605]

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[600] Advocate General Opinion Poiares Maduro in Judgment of the Court of Justice of 20 April 2010, *European Commission v Kingdom of Sweden*, C-246/07, ECLI:EU:C:2009:589, para. 37.

[601] Kalypso Nicolaïdis and Robert Howse, ''This is my EUtopia ...': Narrative as Power.' (2002) 40 Journal of Common Market Studies 767, p. 771.

[602] Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice' (n 331), p. 18.

[603] Karel De Gucht, European Commissioner for Trade 'European Commissioner for Trade The implications of the Lisbon Treaty for EU Trade policy' 2010 <http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146719.pdf> accessed 15 February 2015.

[604] Article 21.1 TEU, cited "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".

[605] Judgment of the Court of Justice, N.Y.P., *Commission v Council (Accord avec le Kazakhstan)*, C-244/17, ECLI:EU:C:2018:364, para. 77.

The new trade policy obliged the EU to carry out the CCP in the context of various and sometimes conflicting trade and non-trade objectives.[606] These various and often competing objectives are established through Article 21 TEU and cannot be ignored in the EU competence since they have been considered not just guidelines but that '(…) Article 21 TEU establishes true legal obligations (...)'.[607]

In the multi-layered system of the EU external relation it is necessary that the notion of the balance of competence becomes the central role in the choice of the appropriate legal basis and the delimitation of competence. 'Attention should be paid to drawing the outer limits of not only the CCP but also the other external relations legal bases in a way which would ensure that the conditions for their application do not become irrelevant.'[608]

The EU's political institutions have a wide discretion, not only to balance competing EU objectives, but more generally to protect the EU's interests in external trade relations – regardless of whether these interests are in conflict with the aim of trade liberalisation. The political objective of international trade liberalisation is a matter of choice and political expediency, and thus, it is differentiated from the core legal principles of internal free trade.[609]

The EU is limited by its own internal procedure considered in relation to the objectives, and its competences to take decisions regarding particular issues within the FTA.[610] Coordination, therefore, functions as the key word for the legal framework, because, at times, it is inevitable not to have overlaps between already existing agreements and new FTAs. The framework agreement, for example, contains a climate change cooperation, which undertakes measures to mitigate carbon emission. This may have significant economic implications, and potentially clash with rules and principles contained in the FTA.[611] Another example of balancing the various policy goals is also reflected in the concept of sustainable development. Such concept should guide the parties in the furtherance of their strategic partnership and help them achieve coherence in their bilateral relations. Consequently, it is to be found in both the framework agreement[612] and FTA.[613]

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606 Article 207(1) TFEU.

607 Per-Christian Müller-Graff and Ola Mestad, *The Rising Complexity of European Law* (Berliner Wissenschaftsverlag 2014), p. 111.

608 Panos Koutrakos, *EU International Relations Law* (1st edn edn, Hart Publishing 2006), p. 198

609 Eeckhout, *External relations of the European Union: Legal and Constitutional Foundations* (n 478), p.348. Marise Cremona, 'The External Dimension of the Single Market: Building (on) the Foundations' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single Market – Unpacking the Premises* (Hart Publishing 2002), p. 351.

610 Harrison, 'An Introduction to the Legal Framework for EU-Korea Relations' (n 78), p. 16.

611 Ibid, p. 15.

612 Framework Agreement Between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part, Article 1(3). In this Article the parties reaffirm their commitment to promoting sustainable development in its entire dimension.

613 EU-Korea FTA, Chapter 13.

The *Durbeck* case[614] dealt with the interaction of two EU policy objectives, the Common Agricultural Policy (CAP) and CCP; and the Court held that the political institutions are relatively free to strike a balance at least in such situations.[615] The case is however carefully worded and based also on the text of the Council's regulation.

In particular, the case does not fully preclude the possibility that there is no need to balance conflicting Treaty objectives; and the aim of the CCP could impose some substantive restrains on the political institutions' exercise of external competence. The case *UK v. Council* concerning import quotas imposed by the EU on certain toys from China, however, makes clear that the objective of trade liberalisation does not in any way curtail the discretion of the political institutions, and therefore, cannot serve as a standard for legality review of EU acts.[616] In this case, the UK argued that the relevant Council's regulation infringed Article 206 TFEU. The Court held that it followed already from the *Durbeck* case that Article 206 TFEU could not be interpreted as prohibiting the EU from enacting any measure liable to affect trade with third countries. As is clear from the actual wording of the provision, its objective of contributing to the progressive abolition of restrictions on international trade cannot compel the institutions to liberalise imports from non-member countries, where to do so, it would be contrary to the interests of the EU.

The Council's discretion was in no way limited by the fact that it had itself decided in the preamble of the regulation that the starting point for the new rules was to be the liberalisation of imports. In that connection, the analogy drawn by the UK government between the national protectionist view on the one hand, and the liberalisation of imports and the exceptions thereto on the other hand is irrelevant. By contrast to the principle of free movement of goods within the EU, the abolition of all quantitative restrictions on imports from non-member countries is not a rule of law which the Council was required in principle to observe but is the result of a choice made by that institution in the exercise of its discretion.[617]

Regulating free trade is very important, even though it can seem to go strictly against the concept of free trade. The EU's commitment to liberalisation of international trade depends on a level playing field between domestic and foreign producers based on genuine competitive advantages. Anti-dumping measures, which are meant to prevent the market from being

[614] C-112/80, Dürbecks (n 533).

[615] Ibid, para. 43 '[T]hat reference to the two articles shows that the regulation is intended to maintain a reasonable balance between the objectives of the common agricultural policy and the interest of the world trade to which reference is made in Article 110'.

[616] Judgment of the Court of Justice of 19 November 1998, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, C-150/94, ECLI:EU:C:1998:547.

[617] Ibid, para. 68.

distorted by products that are sold under their normal value, are examples of this.[618] The defence of free trade is based on the Article VI GATT and Council Regulation 1225/2009 on '(…) protection against dumped imports from countries not members of the European community'.[619] In this respect, it is the task of the Commission to monitor the application of these instruments, follow up the enforcement of measures, and negotiate future international rules with EU partners.

In this regard, it is possible to establish that the CCP should not simply be an instrument to trade protection, but it generally provides guidance towards trade and investment liberalisation.[620] Even the CJEU has declared that Article 206 TFEU should not be used as a benchmark for the review of particular trade measures.[621]

Article 206 TFEU, together with Article 21 TEU, set out the legal constraints from the EU's obligation to pursue external trade trough trade and non-trade objectives. Trade policy is, and has been traditionally, also used to promote foreign policy objectives. The objective should in this type of agreements also incorporates provisions on human rights, labour right and environmental protection. The NGFTAs contain not only essential elements in trade agreements, but also elements such as sustainable development.

Sustainable development provisions are usually drafted in a very broad manner, but still manage to implement labour and environmental agreement rules. Such provisions are to be used in order to promote some kind of minimum standard in the NGFTAs. However, such standard cannot be employed in a way that adversely impacts trade liberalisation in order not to conflict the CCP objectives. One can therefore draw the conclusion that the social and environmental standards are not just an attempt to project constitutive values and norms of the EU, but also an important tool to protect the global competitiveness of EU's firms.[622]

5 Intermediate Conclusion

The changes provided by the Lisbon Treaty revised the EU's competences, and widened the EU's objectives for its external action. These changes have shown to affect both, the process of

[618] Determining whether products are sold below its value is a critical yet politically highly contested process, since it depends on an accurate comparison of data that is inherently difficult to compare.

[619] Amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community [2013] OJ L 237/1.

[620] Eeckhout, *EU External Relations Law* (n 260), p. 440.

[621] C-112/80, Dürbecks (n 533), para. 44.

[622] Melo Araujo, *The EU Deep Trade Agenda: Law and Policy* (n 583), p. 74.

elaboration and the content of the EU's trade policy.[623] The principle of conferral should be kept in mind when discussing the EU's external competence, and what should be considered within the EU's exclusive competence, as well as within shared exclusive competence. The EU's large span of objectives, together with the large scope of NGFTAs, provides a complex picture when defining the extent of the CCP. Even though it is clear that the interpretation of Articles 206 TFEU and 207 TFEU is what defines the limit of the CCP in general, it becomes rather a sliding scale than fixed categories to provide a clear limitation between the different categories.[624] After an indebt analysis, it is possible to conclude that the areas which fall within the EU's exclusive competence pursuant to article 3(1) TFEU, are trade in goods trade and investment in renewable energy generation trade in services. However, in relation to services, transport services are not included. Thereafter areas such as government procurement, intellectual property rights, competition, foreign direct investment, trade and sustainable development, state-state dispute settlement, the termination of Member State BITs for the parts concerning exclusive competence.

The areas which were considered to be within the EUs implied competence pursuant to Article 3(2) TFEU are the following areas; trade in maritime, rail and road transport services commitments on government procurement in the field of transport. Thereafter within the shared competence between the EU and the Member States, the areas that were considered was non-direct foreign investment, in particular portfolio investment and dispute settlement between investor and states.

In relation the EU's implied competence within the NGFTAs, the provision 3(2) TFEU in particular circumstances that 'may affect common rules or alter their scope' should, according to the CJEU in opinion 2/15 be interpreted in a less strict manner than what the AG Sharpston did. This conclusion of the CJEU clearly led to provide the possibility to conclude the agreement within exclusive competence.

However, the non-direct foreign investment, such as portfolio investment, which has no intention to influence the management and control of an undertaking and the regime governing dispute settlement between investors and states, are fields which are not considered to fall within the EU's exclusive competence and the Singapore FTA. For this reason and in relation to how the agreement was at the time it was concluded, it was considered necessary to conclude

[623] European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Social and Economic Committee and the Committee of the Regions, Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy' COM (2010).

[624] Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (n 133), p. 43.

it as a mixed agreement. However, the outcome of this case made the commission to split the agreements into two supporting agreement; an exclusive and a mixed agreement.

Moreover, the question of whether to include the ICS in this type of agreements as a new procedure for dispute settlement remains to be solved, through the pending Opinion 1/17.

Furthermore, it is not only the question of competence but also the objectives that have shown to have a great impact in these type of trade agreements. In Opinion 2/15, it was moreover considered that the close link to the agreement's trade objectives such as the chapter on sustainable development, played a large role and should therefore be considered to be part of the CCP. It clearly shows that the objectives of the EU external trade have a great impact on the interpretation of the CCP. This is contrary to the prior understanding that the nature of the objectives should form more of a guiding indication. Consequently, trade objectives could come to play a large role in the conclusion of an international agreement.

CHAPTER IV
THE NGFTAS AS MIXED AGREEMENTS

This chapter is intended firstly to determine when to conclude NGFTAs as mixed agreements. It will more narrowly consider the legal basis and circumstances for concluding a mixed agreement. The chapter aims at establishing a clear categorisation of when to conclude an agreement as a mandatory mixed agreement and when it is a choice to conclude it as mixed or not.

Secondly, this chapter will consider which practical implication concluding a NGFTAs as mixed agreements can have for the EU. Such legal implications can take place, in the event of incomplete ratification of the agreement by one of its Member States, but also through withdrawal of a Member State of the EU, or through provisional application of a mixed agreement. It will thereafter also address the difficulties that may arise in relation to the question of responsibility since both, the EU and its Member States can be held responsible for not fulfilling their obligation under the agreement.

Thirdly the chapter will discuss the adjustments that the Commission made in order to accommodate to such complicated situations that may emerge in the NGFTAs.

1 Determining when to Conclude NGFTAs as Mixed Agreements

Mixed agreements constitute an integral part of the EU as long as both, the EU and its Member States retain treaty-making capacity.[625] In mixed agreements, the EU and its Member States are contracting parties, and their joint participation is required in the case where not all matters in the agreement fall exclusively within EU's competence, nor within the Member States' exclusive competence. A mixed agreement is concluded in the case where competence over the subject matters of the agreement is shared between the EU and its Member States. This type of agreements form an integral part of the EU law, and is binding on both, the EU's institutions and the Member States.[626] The EU and its Member States are both contracting parties in bilateral and multilateral mixed agreements.[627] When an agreement is negotiated as a

[625] Judgment of the Court of Justice of 8 March 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.*, C-240/09, ECLI:EU:C:2011:125, para. 30; Judgment of the Court of Justice of 10 January 2006, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*, C-344/04, ECLI:EU:C:2006:10, para. 36; Judgment of the Court of Justice of 30 May 2006, *Commission of the European Communities v Ireland*, C-459/03, ECLI:EU:C:2006:345, para. 82.

[626] Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 Fordham International Law Journal 1304.

[627] C-316/91, Parliament v Council (n 276), para. 29.

mixed agreement, each of the parties will have to act within the boundaries of their own competences.[628] The parties are often separated in the preamble of the agreement as the third country, of the one hand, and the EU and its Member States, of the other hand.[629]

The EU is incapable to conclude a mixed agreement, unless the Member States ratify the areas that remain under their competence.[630] The CJEU has not generally established any detailed delineation of areas of competence in the context of mixed agreements. Once exclusive competence is ruled out, the CJEU generally turns its attention to how to best organise the joint participation of the EU and its Member States. One additional reason for its unwillingness to address the exact space of the respective competences of the Member States and the EU, has been the dynamic and evolving nature of EU's competence.[631] In its ruling on the compatibility with the Euroatom Treaty of Member States participation in the convention on the physical protection of nuclear materials, the CJEU held that the division of competence with regards to implementation of the agreement was to be resolved on the basis of the same principles that govern the division of powers concerning the negotiation and conclusion of agreements.[632] According to the CJEU, Member States are subject to special duties of action and abstention as soon as a concerted common strategy exists at the EU's level.[633] The CJEU has also rules that whatever difficulties may be present in managing mixed agreements, these difficulties do not provide a reason for altering the classification of competence, or for arguing that it should be exclusive.[634]

More technical cases, for example, are related to the conclusion of mixed agreements by a hybrid Council act.[635] This act is in part a Council division, and in part a decision of the representative of the Member States' meeting within the Council. The CJEU did not approve of this technique as the unanimity required for an intergovernmental decision of the Member States would distort the decision-making procedure under the TFEU.[636] Another instance is the conclusion of a broad development agreement including a cooperation provision on the readmission of third country nationals, on the basis of Articles 208 and 209 TFEU alone.

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628 C-28/12, Commission v Council (n 277), para. 47.

629 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

630 Van Der Loo, Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions null' (n 252)

631 1/78, Opinion on International Agreement on Natural Rubber (n 24), para. 35.

632 Ibid, para. 36.

633 C-246/07, Commission v Sweden (n 321).

634 1/94, Opinion on World Trade Organization Agreement (n 27), para. 107, 2/00, Opinion on Cartagena Protocol on Biosafety (n 321), para. 41, Opinion 1/08, Opinion Amending EUs Commitments under GATS (n 402), para. 127.

635 C-28/12, Commission v Council (n 277).

636 Ibid, paras. 52-53.

In order to identify the competence through which the international agreement ought to be concluded, one must consider the objective factors open to judicial review, such as the aim and content of the agreement in question.[637] This is because the choice of legal basis, when the EU adopts an international agreement, must rest on objective factors amenable to judicial review, which include the aim and content of that measure.[638] If an agreement would have a twofold purpose, and one would be considered as the main or predominant purpose in the agreement, then the agreement would be based on the predominant purpose, since the other was merely incidental. However, if an agreement, such as NGFTA, is considered to simultaneously pursue a number of objectives or has several components which are inextricably linked without one being incidental to the other, such that various provisions of the Treaty are applicable, such a measure will have to be founded on the various legal basis corresponding to those components.[639]

In other words, it is possible to conclude that if an EU competence is not exclusive, it is in most cases shared with the Member States. Agreements concluded under a shared competence usually become mixed. It means that this type of agreements will be open for conclusion by not only the EU but also its Member States.[640]

Rosas proposed a clear and detailed typology of mixed agreements on the basis of the nature of the competence involved.[641] In such proposition, there is a distinction between parallel and shared competence; and the EU's participation in an agreement is similar to that of any other contracting party and has no direct effect on the rights and obligations of the Member States. Shared competence on the other hand, entails some division rights and obligations contained in the agreements.[642] Coexistent competence is when an agreement contains some provisions falling under the exclusive competence of either the EU or its Member States so that the agreement can be divided into separate parts. There is also concurrent competence, in which the agreement in question forms a whole, which cannot be divided into separate parts.[643]

Rosas also proposes a distinction between obligatory and optional mixed agreements, i.e., the facultative and the obligatory mixity. Situations, where it is required for the EU to conclude

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[637] Marcus Klamert, 'Conflicts of Legal Basis: No Legality and No Basis but a Bright Future under the Lisbon Treaty?' (2010) 35 European Law Review p. 497.

[638] Judgment of the Court of Justice of 14 June 2016, *European Parliament v Council of the European Union*, C-263/14, ECLI:EU:C:2016:435, para. 43; 2/00, Opinion on Cartagena Protocol on Biosafety (n 321), para. 42

[639] C-263/14, Parliament v Council (n 638), para. 44; Judgment of the Court of Justice of 24 June 2014, *European Parliament v Council of the European Union*, C-658/11, ECLI:EU:C:2014:2025, para. 43.

[640] Allan Rosas, 'EU External Relations: Exclusive Competence Revisited' (2015) 38 Fordham International Law Journal 1073, p. 1074

[641] Rosas, 'The European Union and Mixed Agreements' (n 271), p. 368.

[642] On the range of ways which the EU has developed to manage shared competence.

[643] C-13/07, AG Kokott in Commission v Council (n 419), paras. 67-84. A similar argument was made in this case.

an agreement as a mixed agreement, are referred to as obligatory mixity. This type of mixed agreements arises when the EU only have exclusive competence in certain fields and not over other fields, which form part of the agreement.

Facultative mixity entails the situation in which the agreement was of such character that it could be concluded based on exclusive competence or implied exclusive competence but was nevertheless concluded as a mixed agreement. In other words, situations where concluding the agreement as mixed is a choice. Facultative mixity is usually more of a political choice. In such situation, the EU tends to rather choose a mixed agreement, mainly for political reasons.[644]

Indeed, it has been suggested that any attempt to classify mixed agreements risks simplifying the phenomenon. The practice is extremely complicated and difficult because it interacts with a range of external EU powers, and a variety of international agreements.[645]

The NGFTAs may cover subject matters, which fall within the Member States' exclusive competence. If that is the case, it would consequently lead to that the agreements are obligatory mixity. However, if the agreement would cover only matters falling within the EU's exclusive and shared competence, it would mean that mixity is a choice, and thus, the agreement would be facultative mixity.[646]

The issue with concluding mixed agreements is mainly the ratification process. During this process, there is a risk of national parliamentary objections or referendums. In the ratification process, the Member States have the right to veto or nullify by a majority voting in the Council. This means that the Member States have taken better part in the negotiation and signing of the agreement and are also to be more visible during the process on the international scene.[647]

This does not mean that such participation by the Member States would be purely negative for the EU. On the contrary, mixed agreements do not require a clear vertical delimitation of competence between the EU and its Member States. This place the EU in a better position, easily allowing it to have more ambitious agreement without endless battles over the competence questions.

AG Sharpston expresses it as '(…) the mixed agreement is itself a creature of pragmatic forces – a means of resolving the problems posed by the need for international agreements in a multi-layered system'.[648]

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644 Rosas, 'The European Union and Mixed Agreements' (n 271), p. 368.

645 Eeckhout, *External relations of the European Union: Legal and Constitutional Foundations* (n 478), p. 191.

646 Rosas, 'The European Union and Mixed Agreements' (n 271), p. 368.

647 Article 218(8) TFEU.

648 C-240/09, AG Sharpston in Lesoochranárske zoskupenie (n 313), para. 56.

Against this background, one can draw the conclusion that NGFTAs, in accordance with AG Sharpston, '(…) can be concluded only by the European Union and the Member States acting jointly (…)'.[649]

A number of competence issues remain in this regard; namely the inclusion of portfolio investment in the chapter on investment and investment protection, or the termination of existing Bilateral Investment Treaties (BITs) of Member States with contracting parties.

Similarly, areas within transport but also in relation to establishing a mutual recognition of professional qualifications can be considered as areas which remain problematic under the NGFTAs.

These agreements may also raise competence issues in relation to provisions to safeguard external financial position, specifically in relation to Member States, which are not part of the European Monetary Union.[650] For this reason, it is important to thoroughly look if the NGFTAs are concluded as cases of obligatory mixity, facultative mixity, or no mixity at all. In many ways, a mixed agreement is a better political option, since it eases the EU's navigation through the 'jungle of external competences'.[651] Where to draw the exact division for the EU's external competence remains unclear and is left to the discretion of the CJEU.[652]

1.1 Mandatory Mixity

In circumstances where the EU has exclusive competence over one area of an agreement but no competence over another area, where such area fall under Member States exclusive competence, provides the obligation for the EU to conclude an agreement as a mixed agreement, in other words mandatory mixity arises. The NGFTAs are therefore mandatory to be concluded as mixed agreements in situations where an agreement falls partly within exclusive competences, and partly within Member States' exclusive competences. This is in contrast to situations where the agreement contains areas which are within the shared competence between the EU and its Member States, where, in which case, it will fall under facultative mixity.

Consequently, certain provision in an agreement may provide the necessity for the EU to open up to the 'pastis doctrine'.[653] In instances where the agreement contain competence which are exclusively shared it can lead to the necessity to conclude an agreement as a mixed

[649] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 570.

[650] Art 28.5 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, similarly Arts 143 and 144 TFEU, the EU has the competence to investigate and to grant mutual assistance, but no legislative competence.

[651] Klamert, *The Principle of Loyalty in EU Law* (n 248), p. 184.

[652] C-414/11, Daiichi Sankyo (n 431) , 3/15, AG Wahl in Opinion on Marrakesh Treaty to Facilitate Access to Published Works for Disabled Persons (n 364).

[653] C-13/07, AG Kokott in Commission v Council (n 419), para. 121.

agreement, the Advocate General Kokott compared the competences to '(…) a little drop of pastis[that] can turn a glass of water milky.'[654] Subsequently, it shows the necessity to distinguish between areas falling under shared competence between the EU and the Member states and areas which fall under shared exclusive competence of the Member States.

1.2 Facultative Mixity

When an international agreement has parts falling within shared competence, it may be concluded exclusively by the EU through the notion of 'facultative EU-only' agreements. An example, prior to the CETA agreement, can be the Stabilization and Association Agreement with Kosovo, which fell under shared competence but was still concluded as a mixed agreement.[655] Furthermore, it has been observed that in practice, most agreements concluded through shared competence will be concluded as 'mixed agreements'. It seems as a more convenient political option at times.

However, an international agreement, apart from its annex, covers areas over which both the EU and its Member States exercise their respective competences, the agreement needs to be concluded as 'mixed', in the sense that both the EU and its Member States need to ratify the agreement jointly. In this regard, the EU is prevented to act alone. The EU Member States often insist on exercising their powers to ensure that the agreement is mixed. In practice, almost all EU's agreements are mixed. The main problem occurs if the new Free Trade Agreement (FTA) imposes provisions that overlap with the already existing agreement, which then can cause significant economic implications.[656] In the case of dispute settlement, for example, it is decided that it should be decided by independent adjudicators.[657]

In situations where the agreement covers an area of shared competence, it is optional whether or not to conclude the agreement as a mixed agreement. In this case, it is within the discretion of the Council.[658] This applies irrespective of whether the shared competence of the agreement is put in combination with the areas falling under exclusive competence or not.[659] In

[654] C-13/07, AG Kokott in Commission v Council (n 419), para. 121. In this case there are individual provisions falling within the competences of Member States, that secondary, "infect" the agreement as a whole and trigger mixity (i.e. the "Pastis doctrine").

[655] Peter van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo' (2017) 22 European Foreign Affairs Review 393.

[656] Harrison, 'An Introduction to the Legal Framework for EU-Korea Relations' (n 78), p. 15. The climate would be an example of change cooperation within the framework agreement, which undertakes measures to mitigate carbon emission.

[657] Ibid, p. 15.

[658] 3/15, AG Wahl in Opinion on Marrakesh Treaty to Facilitate Access to Published Works for Disabled Persons (n 364), paras. 111-120; 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), paras. 73-75.

[659]Klamert, *The Principle of Loyalty in EU Law* (n 248), pp. 183-186; Klamert makes a very clear and detailed classification of the EU competences.

this regard, mixed agreements may be regarded as a political choice for the EU.[660] They usually cover a wide range of areas within shared and exclusive competence. The reasoning why the CJEU decided that the NGSFTA should be concluded as a mixed agreement was due to that the agreement covers several provisions falling within shared competence, and one falling fully under the Member States' competence, the agreement needs to be concluded as a mixed agreement.[661] Since the agreements include similar width of subject areas, it is possible to draw the conclusion that also the TTIP or the EPA agreement would be concluded as mixed agreements.

The fact that the competence to conclude an international agreement is shared between the EU and its Member States, in regard to the extent of the EU having exclusive competence and the Member States having shared competence within one agreement, cannot have a consequence on the competence of the EU to conclude such agreement in relation to both, the substantive or procedural validity of the EU's decision to conclude it.[662] For the allocation of competence, it is not within the responsibility of the CJEU to provide exact guidance on who has competence in relation to every single provision of the agreement.[663]

With the procedural difficulties that may arise from the mixity, the CJEU has made clear that there is a need for unity within the EU external action.[664] Naturally, mixity is not always a legal based decision. In essence,

> (...) if there is political consensus among the Member States that an agreement ought to be mixed, they will almost certainly manage to impose the mixed procedure, particularly by adding provisions which stand on their own and need Member State involvement.[665]

This was further demonstrated in the conclusion of the CETA as a mixed agreement, where the Trade Commissioner Cecilia Malmström said

> From a strict legal standpoint, the Commission considers this agreement to fall within exclusive EU competence. However, the political situation in the Council is clear, and we

[660] The Member State may also in certain situation promote EU-only agreements instead of mixed agreements. This would run counter to the Member State's own interest but in certain situation, example with association agreement, which are usually mixed agreement, in the case of the EU-Kosovo Association Agreement certain Member State wanted to avoid recognizing the Kosovo as a state and therefore preferred it to be an EU-only agreement. van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo' (n 655).

[661] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), paras. 562-563, According to the AG, the EU shares its competence with the Member States. The Member States also have competence in regard to the termination of bilateral investment agreements concluded between the Member States and Singapore.

[662] 2/00, Opinion on Cartagena Protocol on Biosafety (n 321), para. 15.

[663] Ibid, paras. 6 and 17.

[664] 1/94, Opinion on World Trade Organization Agreement (n 27), para. 107, Opinion 1/08, Opinion Amending EUs Commitments under GATS (n 402), para. 127.

[665] Maresceau, 'A Typology of Mixed Bilateral Agreements' (n 212), pp. 11-29 at 16.

> understand the need for proposing it as a 'mixed' agreement, in order to allow for a speedy signature.[666]

Even though the choice would be politically based, the way of progressing to negotiation remains within a legal channel. The procedures are set out in Article 218 TFEU. Since the negotiation and conclusion of an agreement require a number of separate Council decisions,[667] (in most cases) taken by a qualified majority[668], it becomes a decision made by the Member States. As AG Sharpston puts it '(…) the Member States acting in their capacity as members of the Council which authorise the appropriate EU institution to act (…)'.[669]

Through the *OTIF* case, the CJEU tried to clarify the uncertainties surrounding the effect of the facultative mixity in Opinion 2/15 that was discussed in para. 255.[670] The CJEU had indicated that mixity would be mandatory for agreements which covered partly or entirely shared competence, which is radically different to already established case-law. The CJEU concluded in Opinion 2/15 that the EU could not act alone in the shared area of non-direct foreign investment, and tried to clarify that in the *OTIF* case, it was solely linked to the specific circumstances.

> 'However, in making that finding, the Court did no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area.'[671]

In other words, this gives a clear understanding that it was not within the intention of the CJEU to radically change established case-law. It concludes that when there is shared competence over a policy area in an agreement, the existence of the competence itself does not indicate who is acting to ratify the agreement. It leads to a large political discretion.

The existence of shared competence over a policy does not dictate who is acting in order to ratify it, which remains largely subject to political discretion of the legislator. The issues surrounding the NGFTAs illustrate the practical implications that the Member States' parliamentary involvement can have on the ratification on NGFTAs. Belgium has requested the

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[666] Council of the European Union 'EU-Canada Trade Agreement: Council Adopts Decision to Sign CETA' (n 254).

[667] The Council is authorizing for the opening of negotiations, adopting negotiating directives, and authorizing the signing and conclusion of an agreement.

[668] Exceptions requiring unanimity according to Article 218(8) TFEU.

[669] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 74.

[670] C-600/14, Germany v Council (n 311), para. 68.

[671] Ibid, para. 68.

CJEU to decide on the compatibility of CETA's investor-State dispute settlement provisions with EU law in Opinion 1/17.[672]

Facultative mixity is of specific importance in order to balance on the one hand the concerns of the EU as a treaty-making actor, and on the other hand the effective implementation of the CCP.

In Opinion 2/15, the CJEU concludes that since the EUSFTA falls partly within shared competence, it '(…) cannot be approved by the EU alone'.[673] The CJEU stipulated that the ISDS mechanism '(…) cannot (…) be established without the Member States' consent'.[674]

This statement by the CJEU is more or less clearly indicating that the mechanism of facultative mixity would no longer be a choice at least not in the sense of the ISDS mechanism. It could therefore here be considered possible that the CJEU has taken the stand by the theory earlier mentioned in relation to the Council, the finalist theory, which is instead to include every measure that would be likely to influence the volume of flow of trade as part of the CCP.[675]

In the *OTIF* case,[676] the CJEU relied on Opinion 2/15 to substantiate its reasoning in relation to the exercise of its external competences in a field even though '(…) the Union had taken no internal action, by adopting rules of secondary law, in that field', such as in the case of non-direct foreign investment.[677] The CJEU further discussed certain effects surrounding facultative mixity, and the effects of Opinion 2/15. In Opinion 2/15, it was clarified that the EU cannot act alone in shared competence in areas of non-foreign direct investment and that this proposition in the previous opinion was solely related to the specific circumstances of the *OTIF* case and could not be considered to have become a general rule.[678]

Such ramification of Opinion 2/15 needed to be clarified in the *OTIF* case. There have been, in many occasions, clarifications of prior cases in the CJEU decision-making, but the issue is rather more attached to the sitting of the Court. Opinion 2/15 was a Grand Chamber judgment, which altered the clear meaning found in the judgment of the full court.

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672 Opinion of the Court of Justice, *(Agreement EU-Canada)*, 1/17, NYP.

673 2/15, Opinion of Singapore FTA (n 211), paras. 244, 282, and 304.

674 Ibid, para. 292.

675 Eeckhout, *External relations of the European Union: Legal and Constitutional Foundations* (n 478), p. 19.

676 C-600/14, Germany v Council (n 311); This case concerned a German challenge to the validity of a Council Decision that established a position to be adopted on behalf of the EU at a session of the OTIF (Organization for International Carriage by Rail), Revision Committee concerning certain amendments to the Convention Concerning International Carriage by Rail (COTIF). Germany considered that the proposed amendments did not fall under EU competence. Germany consequently argued that the EU lacked competence in the matter and acted in violation of the principle of conferral, the obligation to state reasons, the principle of sincere cooperation, together with the principle of effective judicial protection. The CJEU dismissed the action.

677 Ibid, para. 67.

678 Ibid, para. 67.

When it comes to mixed agreement, it is difficult to know when an international agreement should be concluded as a mixed agreement. In other words, it is not trivial to examine to which extents an international agreement should be considered as shared or exclusive. In general, the NGFTAs are not determined upon specific legal basis, but rather subject to the deliberations in the Council, which has been emphasised by both, AG Sharpston in Opinion 2/15[679] and AG Wahl in Opinion 3/15.[680] This is linked to the fact that the notion of facultative mixity gives the EU discretion in relation to the question whether to conclude an agreement as an EU only agreement or within shared competence.

The CJEU clarified that the EU has exclusive competence over most of the EUSFTA, and shared competence over non-direct investment and investor-state dispute settlement. The Member States' involvement is required in the conclusion of an agreement, even though the CJEU means that the EU can conclude it by itself.[681]

Through conferred competence, there may be aspects of agreements reserved to the Member States, in which the EU has no competence internally. In this way, the agreement would be dependent on the common accord of the Member States, where individual provisions, even though they are secondary, can be necessary to conclude an agreement within shared competence. However, the CJEU has made clear that '(…) individual clauses of an altogether subsidiary or ancillary nature' cannot itself trigger mixity.[682] The CJEU has stated that 'when examining the nature of the competence to conclude an international agreement, there is no need to take account of the provisions of that agreement which are extremely limited in scope'.[683]

1.3 Legal Basis for Determining an Agreement as Mixed

It is necessary to discuss the mixed agreement in relation to the intent to achieve a unified interpretation also in mixed agreements, mainly due to that the discussions that these cases promoted. First of all, it is important to recall that the CJEU is required to determine the correct legal basis on the grounds of ''objective factors amenable to judicial review'. These legal grounds can be rather abstract and may require legitimate demand for empirical evidence. The CJEU, through its economic-based analysis did very little to operationalize the relationship between the content of an agreement, the specific measures it requires as a function of its

[679] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 74.

[680] 3/15, AG Wahl in Opinion on Marrakesh Treaty to Facilitate Access to Published Works for Disabled Persons (n 364), para. 119.

[681] 2/15, Opinion of Singapore FTA (n 211), paras. 244 and 292.

[682] 1/78, Opinion on International Agreement on Natural Rubber (n 24), para. 56.

[683] 2/15, Opinion of Singapore FTA (n 211), para. 217; Opinion 1/08, Opinion Amending EUs Commitments under GATS (n 402), para. 166. However, the Court considered in these i.e. the nature of EU competences and not the. The existence of EU competences).

obligations, and on whether they would have direct or immediate effect on international trade and investment.

Frequently, to consider the objective of the agreement has boiled down analysing the language of the preamble in an agreement, rather than examining and comparing the specific measure of the objectives which are pursued in the agreement. If this will be the case by the CJEU, if can be very problematic not only in regard to the appropriate legal basis for an act concluding an external agreement but also in relation to determining the areas of external action and the fields of international competence through the delineation of the competences of the CCP.

However, reasoning in line with the view of Kleimann, the question should be posed whether the CJEU's considering the direct and immediate effect and measure that affect trade by implication, given the state of regional and global economic integration and the corresponding regulatory environment may lead to additional clarity a clearer picture when determining the legal basis for the CJEU.[684]

The CJEU's way of interpreting the 'direct and immediate effects on international trade' as a case-by-case basis, shows the indeterminacy of the scope of the CCP, and at the same time the possibility for the CJEU to have a discretionary space of manoeuvre in its interpretation.

Secondly, facultative mixity can be considered as more of a political choice, while obligatory mixity is established on the combination between Article 5(1), the principle of conferral, and Article 2 TFEU. The obligatory reasoning should not be confused with the 'main purpose test' for international agreements used in order to find the proper legal basis for EU's external action.[685] Such purpose test only applies in relation to where the necessary competence has been conferred upon the EU, either explicitly or implicitly, and is considered to be 'beyond doubt'.[686]

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[684] David Kleimann, 'Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General' (2017) Robert Schuman Centre for Advanced Studies Global Governance Programme RSCAS 2017/23 <http://cadmus.eui.eu/bitstream/handle/1814/46104/RSCAS_2017_23REVISED.pdf?sequence=4&isAllowed=y> accessed 26 March 2017., p. 8.

[685] 2/00, Opinion on Cartagena Protocol on Biosafety (n 321), para. 23. The Court also emphasizes that the choice of the legal basis for an international agreement will be assessed in the light of its context, aim, and content (*ibid,* paras. 22 and 25).

The legal basis could have a twofold purpose, where one component can be identified as the main or predominant purpose whereas the other is considered more incidentals. In these circumstances the legal basis should be defined on the main or predominant purpose. There are however an exception if the agreement would however pursues measures which pursues several different objectives where it is not possible to find one of them being predominant but are in fact inseparably linked, than the measure may be founded on the corresponding legal basis. Another exception is in agreements where Member States have retained their competence in specific areas, through 'lex specialis' then the EU 'cannot declare to have competence through the main-purpose test. C-13/07, AG Kokott in Commission v Council (n 419), para. 113.

[686] C-13/07, AG Kokott in Commission v Council (n 419), para. 113.

2 Practical Implication from Concluding NGFTAs as Mixed Agreements

Before a mixed agreement can enter into force, it needs to be ratified by all the parties, this includes all the EU's Member States. There may therefore leas to create an 'additional reinforced unanimity'. However, in practice is provides difficulties, where it can be regarded even as unworkable, since it may block the entry into force of the agreement and seriously affect the EU as while as well as the Member States that have already ratified the agreement.[687]

The way the EUSFTA was constructed resulted in the necessity to conclude it as a mixed agreement. This was because the CJEU clarified that the EU has exclusive competence over most of the areas in the EUSFTA, and shared competence over non-direct investment and investor-state dispute settlement. The Member States' involvement is required in the conclusion of an agreement, even though the CJEU means that the EU can conclude it by itself.[688]

For the conclusion of the agreement, it is therefore necessary to clarify the distinction between a 'complete' and 'incomplete' mixed agreement. A 'complete' mixed agreement refers to when the agreement has been ratified within all Member States. Consequently, 'incomplete' mixed agreements refer when an agreement does not become a full fletched agreement, which is an outcome solely possible in relation to mixed agreements.

2.1 Issues Stemming from Non-ratification of Mixed Agreements

The agreement would appear 'incomplete' if one Member State refused to ratify and would thus impede the agreement to enter into force.[689] These 'incomplete' mixed agreements can either be the consequence due to non-ratification where a Member State blocks the ratification procedure, or in a situation where the agreement was ratified but a Member State withdraws from the EU.[690]

If a Member State chooses not to ratify an agreement, it would need to notify the other party according to the procedures concluded in the agreement.[691] This naturally means that a party rejecting to ratify the mixed bilateral agreement would lead to that the agreement cannot enter into force even though all the other Member States together with the third party would have ratified the agreement. However, the issue is rather that the EU together with its Member

[687] Maresceau, 'A Typology of Mixed Bilateral Agreements' (n 212), p. 12.

[688] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), paras. 244 and 292.

[689] Joni Santeri Heliskoski, *Mixed Agreements as a Technique for Organising the International Relations of the European Community and its Member States* (Kluwer Law International 2001), p. 92.

[690] Van Der Loo, Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions null' (n 252).

[691] Articles 65(1) and 67(2) Vienna Convention on the Law of Treaties. The notification should in practice be sent the other Party, and/or the Depository of the agreement.

States are contracting parties; and the EU ratifies the mixed agreement only after all Member States have completed the ratification. Essentially, this could lead to that one Member State could block the ratification process of the agreement. This could, in turn, mean that the EU would be impeded from exercising its competences, the exclusive competences.[692] Article 2(1) is essentially precluding the Member States from vetoing application of the areas falling within exclusive powers.[693] The CJEU has as well indicated that in terms of mixed agreement, both the EU and its Member State have to act within their respective competences.[694]

The ratification procedure would for this reason only apply to cover the elements of the agreement falling within the competence of the Member State. This is because the Member State have been already given the possibility of rejecting or consenting with the entire agreement before the ratification procedure.[695] Such choice, however, has to respect the EU rules on allocation of competences between itself and its Member States. It thus follows that when the Council would make its decision of concluding the agreement, it would cover only the elements falling within the EU's competences. This leads to the consequence that the freedom of ratification given to the Member States is not absolute, and is in fact, clearly restricted by the EU's allocation of competence. Moreover, the Member States are also obliged not to defeat the object and purpose of the agreement according to the Vienna Convention on the Law of the Treaties (VCLT).[696]

2.2 Incomplete Agreement Due to a Member State's Withdrawal

It is possible that a bilateral mixed agreement is initially completed by all the parties, later becomes incomplete. This can happen through a withdrawal of one of the Member States of the EU. It can also happen through changes by a government in a particular Member State, which leads to changes of priorities. The obvious example here is Brexit. According to Van der Loo and Wessel, it would amount to a 'complete incompleteness'.[697]

However, looking at the situation from a more pragmatic angle, it would not really amount to an incomplete situation. The Member State, which is withdrawing, would, when the withdrawal is completed, clearly be considered as a third state since it would no longer be a member of the EU.

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[692] Heliskoski, *Mixed Agreements as a Technique for Organising the International Relations of the European Community and its Member States* (n 689), pp. 92-95.

[693] Kleimann, Kübek, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15' (n 270).

[694] C-28/12, Commission v Council (n 277), para. 47.

[695] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 568.

[696] Article 18(a) Vienna Convention on the Law of Treaties.

[697] Van Der Loo, Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions null' (n 252), p. 748.

Furthermore, there are other legal issues that can come out from such withdrawal, and which can affect the situation of the third party bilateral mixed agreement. If for example, the withdrawing Member State would like to remain part to a mixed agreement, from an EU's perspective, this could be possible in terms of administration. The withdrawing Member State would then, during the terms of the negotiation of the withdrawing agreement, state the rights and obligations it has, and that it could be able to join, but as a third party. The perspective can be a little more difficult; specifically, in regards to these bilateral mixed agreements, because it would lead to that the EU would be required to change the base of the agreement from a bilateral to a multilateral agreement.[698] However, the withdrawing Member State would remain party to the treaty in force until the day of the actual withdraw from the EU, with a two-year period of withdrawal according to Article 50(3) TEU.[699]

Moreover, it could as well trigger renegotiation initiated by the third party, because the third party would consider the withdrawal of the Member State to change the circumstances of the agreement; in this case, the withdrawal may alter the bargaining power of the EU, as a global actor.

2.3 Division of Competence in Relation to Enforcement

The discussion of the EU's division of competence is also relevant for the execution stage of agreements, more precisely in relation to the question of responsibility. It is linked to the CJEU and its ability to rule on international agreements. In accordance with the principles applicable to mixed agreements, the CJEU retains exclusive jurisdiction over the provisions, which fall under exclusive competence.

However, the CJEU has no jurisdiction over the agreement if part of if falls under exclusive Member States' competence.[700] In this case, the elements, which fall under exclusive competence, shall be the mixed nature of NGFTAs in relation to the EU's ratification procedure.

In order to negotiate, sign and ratify trade agreements under EU law, various institutions are required to be involved, together with the Member States.[701]

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[698] Guillaume Van der Loo and Steven S Blockmans, 'The Impact of Brexit on the EU's International Agreements' (2016) CEPS Commentary, Britain and the EU Institutions

[699] It is necessary to distinguish between the period from the notification to signature of the withdrawal agreement and the final phase of its approval/ratification.

[700] Nikolaos Lavranos, 'Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals' (2005) 14 European Environmental Law Review .

[701] Eeckhout, *EU External Relations Law*(n 260), pp. 195-207.

After the Lisbon Treaty, the European Parliament plays an important role in the conclusion of trade agreements. A mixed agreement has to be signed by both, the individual Member States and the EU, in order for both parties to express their consent.[702]

The Council takes the decision on the signature and the provisional application, where it authorizes the president of the Council to designate the persons empowered to sign the agreement on behalf of the EU. A similar procedure will be done in each Member State according to their conditional procedures. In other words, all these procedural requirements need to be concluded before the agreement can enter into force.[703]

Other forms of FDI, such as capital transfer and FDI in transport services, are still within the scope of the Member States. This means that these areas go under the competence of the Member States, which in turn means that the Member States would be internationally responsible under NGFTAs.

The fact that FDI has been transferred into the EU's exclusive competence does not affect the determination of international responsibility between the EU and its Member States in agreements signed prior to the Lisbon Treaty. This is because the question of competence is based on the principle of conferral on which competences are attributed; and it is not possible to *ex post* alter the competence basis on which the obligations were determined. Agreements on FDI concluded within shared competence prior to the Lisbon Treaty need to remain within shared competence. This naturally means that one has to consider the actors acting under shared competence when the agreement was concluded, in order to be able to determine whether the violation was manifest. In this regard, the EU is engaged only to the extent of which it had exclusive competence, while Member States are held responsible for their commitment in the fields of shared competence.[704] However, the CJEU meant that the EU can exercise its shared competence as well.[705] Concerning this matter, one can view the exercise of shared competence with the legal basis used for the adoption of the mixed agreement.[706]

In this regard, it may be difficult to distinguish between the different competences, and to what extent the EU has exercised its power and assumed investment-related obligations. In fact, the legal basis is only one indication of the exercise of shared competence, and there are also other factors.[707] Consequently, because of the difficulty in determining whether it is the

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[702] Article 12(1) Vienna Convention on the Law of Treaties.

[703] Article 14(1) ibid.

[704] Allan Rosas, 'International Dispute Settlement: EU Practices and Procedures' (2003) 46 German Yearbook of International Law 284; Opinion of Advocate General Maduro Judgment of the Court of Justice of 30 May 2006, *Commission of the European Communities v Ireland*, C-459/03, ECLI:EU:C:2006:42, para. 33.

[705] Judgment of the Court of Justice of 7 October 2004, *Commission of the European Communities v French Republic*, C-239/03, ECLI:EU:C:2004:598, para. 30.

[706] C-459/03, Commission v Ireland (n 625), paras. 96-97.

[707] Dimopoulos, *EU Foreign Investment Law* (n 92), p. 257.

EU or its Member States that have exercised their shared competence, one can conclude that the obligations relating to the existing NGFTAs or even non-FDI obligation in future agreements, where the competence is attributed to both the EU and its Member States, cannot in this way lead to a manifest violation of competence rules.[708]

Similarly, in relation to areas falling within implied exclusive competence when the agreement was concluded, Member States cannot be responsible for performing their obligations falling under implied exclusive competence, such as in the case of *ERTA,* where the exclusivity is a fundamental rule of EU law, which third states should consider when concluding mixed agreements. Applying this principle in the field of FDI has been unpredictable. This is because the competence of the EU can be rendered exclusive during the lifecycle of the international agreements, as a result of adopting internal rules after the international agreement was concluded. This leads to the conclusion that the violation of the rule would not be manifest, and since it is too complicated to be objectively evident to third parties.[709]

However, in the report of the International Law Commission (ILC), the EU and its Member States are recognized for the responsibility of the international organisation also in areas of shared competence,[710] but if such obligations were found in a mixed agreement, where there is no declaration of competence, it would be equally binding on both the EU and its Member States. The ILC recognized the *EDF* case,[711] as a general principle of international law in relation to legal certainty. The rule of assumption in relation to establishing the obligations beyond the EU competence is binding.[712] This naturally means that investments are related to its obligation in the EU IIA are existent to both EU and its Member States.

In this regard, it is easy to draw the conclusion that because of the EU's defined exclusive competence in the area of FDI, future agreements made by the EU regarding the question of responsibility will apply solely in relation to non FDI obligations, that is, capital transfers and FDI in transport services, since these areas are still remaining under the EU's shared competence.[713]

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[708] Martin Björklund, 'Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care' (2001) 70 Nordic Journal of International Law 373, pp. 393-395.

[709] Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395, p. 848.

[710] UN United Nations General Assembly, 'Report of the International Law Commission 61st Session' (2009) No10 (A/64/10) <http://legal.un.org/ilc/reports/2009/> accessed 16 April 2018., p. 144.

[711] Giorgio Gaja, 'Second Report of the Special Rapporteur on the Responsibility of International Organizations' (2004) UN Doc A/CN.4/541 Responsability of International Organizations <http://legal.un.org/ilc/documentation/english/a_cn4_541.pdf> accessed 14 April 2018., para. 8.

[712] Ibid , paras. 25 and 52.

[713] Dimopoulos, *EU Foreign Investment Law* (n 92), p. 258.

2.4 NGFTAs and Issues in relation to Responsibility

When discussing the issue of responsibility, distinguishing between financial and international responsibility is necessary. Financial responsibility is defined as the obligation to pay a sum of money awarded by an arbitration tribunal. It could also refer to the financial responsibility agreed as part of a settlement and would thereby include the cost which would arise from such arbitration.[714] International responsibility, more generally, refers the violation of an international obligation. The violation is based on the legal relation between two states; firstly, the State where the unfulfilled obligation existed, which can demand reparation and secondly, the state to which the act is imputable. both individuals and corporations are considered 'objects' of international law, and may, invoke the question of responsibility in international law on the international plane in certain specific circumstances essentially in relation to human rights and investment where they can be held accountable for their own internationally wrongful acts.[715]

The question of responsibility for the NGFTAs, the primary concern would surround the investors right but also the question of correct implementation of the agreement in question which would determine who would be responsible for such breach, whether it should be the EU or one of its Member States. There are many possible situations where both the EU and its Member States have certain competences and where the regulatory conduct may affect the rights of investors. For this reason, the division of competence play an essential role. The division of competence is specifically relevant in relation to mixed agreements that does not make any reference to such division.[716] AG Micho, meant that these mixed agreement indicates for the third parties that the agreement does not fall wholly within the competence of the Community and that the EU is only assuming responsibility for the performance of the obligations which fall within its competence.[717] In other words, irrespectively of whether such division has been declared to the third party, the division of competences is relevant for the determination of the responsibility of the EU and its Member States.

By discussing the division of competence, and its importance in relation to international responsibility it does not indicate that the joint responsibility is ruled out. The lack of a clear

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[714] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 Establishing a Framework for Managing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is party [2014] OJ L 257/121, art. 2 (g).

[715] Alain Pellet, 'Introduction, Responsibility and International Law - The Definition of Responsibility in International Law' in Alain Pellet James Crawford, Simon Olleson, Kate Parlett (ed), *The Law of International Responsibility* (Oxford University Press 2010), p. 6.

[716] Heliskoski, *Mixed Agreements as a Technique for Organising the International Relations of the European Community and its Member States* (n 689), pp. 141–53;

[717] Opinion of Advocate General Mischo in Judgment of the Court of Justice of 19 March 2002, *Commission of the European Communities v Ireland*, C-13/00, ECLI:EU:C:2001:643, paras 29, 30.

declaration of competence in the EU's agreement, should be within the accordance of the EU's division of power and should not under any circumstances be entrusted to a third party not belonging to the EU legal order. This is because such interpretation could severely undermine the autonomy of Union law.[718]

After the Lisbon Treaty, foreign direct investment falls within the scope of the CCP, which means that it is under the EU's exclusive competence.[719] In this regard, breaches of international obligation in investment matters would fall within the EU's responsibility. In general, this should apply irrespective of whether a Member State is involved, or who, between the EU and the Member States, made the wrongful conduct. The fact that the international responsibility should be dependent on the EU's internal allocation of competence would be questionable in relation to international legal practice. Whether the EU or the Member States would be held responsible for wrongful conduct would depend on the legal regime established in the free trade agreement, under each respective investment chapter.[720]

Whether these agreements were concluded as exclusive or mixed would also play a role in relation to international responsibility. An example of concluded mixed agreements is the CETA, with its provided ISDS mechanism. It remains to understand what the specific mechanism in each concluded mixed agreement is stating in regard to whom between the EU and its Member State would hold responsibility in such matters. The EU would therefore act as respondent in situations where a dispute exclusively concerns actions by its institutions, bodies, offices or agencies. In such dispute, the EU should bear the potential financial responsibility.[721]

2.4.1 Mixed Agreements and Financial Responsibility

There is a clear distinction between the international responsibility and the financial responsibility, which should be clarified. International responsibility refers to the responsibility in relation to the treatment which is subject to the dispute settlement following the division of competences between the EU and its Member States. The EU is responsible for defending any claims alleging violation of rules which fall under its exclusive competence. This applies irrespective of whether such violation was committed by the EU or its Member States. The essential is that the violation of rules fall within the EU's exclusive competence.[722]

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[718] 1/94, Opinion on World Trade Organization Agreement (n. 27) paras. 1 and 98; 2/91, Opinion on Convention ILO on Safety in the Use of Chemicals at Work (n 322), para. 39; C-53/96, Hermès International (n 312) , para. 25.

[719] Article 207 of the Treaty on the Functioning of the European Union ('TFEU'). On the impact of this new EU competence, on the allocation of international responsibility. Eileen Denza, 'Responsibility of the European Union in the Context of Investment' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013).

[720] Regulation 912/2014 Establishing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals (n 714).

[721] Ibid, preamble, recital 8.

[722] Ibid, preamble, recital 3.

In relation to NGFTAs, which are usually concluded as mixed agreements, the division of competence is sometimes even more important, since these agreements do not normally refer to the different competences. The division of competence is the relevant factor to determine the question of responsibility due to '(…) the very fact that the community and its Member States had recourse to the formula of mixed agreements announces to third parties that the agreement does not fall wholly within the competence of the Community and that the EC is only assuming responsibility for the performance of the obligations which fall within its competence.'[723]

The question of responsibility should be considered together with the VCLT. A State or an international organisation '(…) may not invoke their internal rules as justification for their failure to perform a treaty'.[724]

Furthermore, once the EU has given its consent to an international organisation, it could only invalidate such consent in case it could be shown that there was a violation, which was manifest and concerned a rule of its internal law or fundamental importance.[725,726]

The risk of interference in the EU's institutional balance is important to consider. The possible interference between an investment tribunal, and the exclusive competence of the preservation of the system of vertical allocation of competence seems to be answered by the power the EU has, acting as a respondent in relation to the financial responsibility. This division of competence in the financial responsibility basically allows preserving the autonomy of the EU legal order regarding issues of competence.

Financial responsibility, on the other hand, is related to the entity responsible for certain actions which are inconsistent with the provisions of the agreements. In this case, if it had been carried out by an EU's institution, body, office or agency, the EU will be held responsible. Moreover, the EU would be also held responsible in situations where the Member States would have carried out an activity in order to fulfil its obligation under EU law. This relates to the case, where the Member States would violate provisions of the agreement, while carrying out their responsibility toward a directive adopted by the EU. The Member State would be held responsible in individual cases, where the violation is carried out by the Member State and is not an outcome of fulfilling obligations of EU law. In these cases, the Member State and the EU should bear financial responsibility for the treatment afforded by either of them.[727]

[723] C-13/00, AG Mischo in Communities v Ireland (n 717), paras. 29-30.

[724] Article 27, Vienna Convention on the Law of Treaties.

[725] Article 46 ibid.

[726] Dimopoulos, *EU Foreign Investment Law* (n 92), p. 255.

[727] Regulation 912/2014 Establishing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals, preamble (n 714), recital 7.

The Lisbon Treaty's establishment of the entire FDI competence to be exclusive, indicates that the EU alone will bear responsibility for violation of FDI's provisions in the NGFTAs. Capital transfers and FDI in transport services are nevertheless excluded from this rule.

Whether an agreement is signed under exclusive or shared competence does not affect the responsibility of the EU toward the areas of FDI. The EU is therefore the sole responsible actor for performance and violation of the investment obligations.[728] Article 46 VCLT has been previously used by the Member States to escape international responsibility. This was in relation to the GATT, which falls under the scope of the EU's competence; and in this case, the Member States successfully escaped responsibility for their violation of FDI's provisions by employing Article 46 VCLT.[729,730]

In relation to the validity of the obligations that have been entered into by the EU, the Member States, or both, it is not always the division of competence that plays the most adequate role. In fact, in certain situations, the parties may have entered into agreements on a specific competence, but then years later, such competence may have been altered either through implied external competence or a change of treaty.

In situations where an agreement includes a declaration of competence, both the EU and its Member States need to assume their full rights and obligations under the agreement. Even in this type of circumstances, the EU and its Member States are required to assume their rights and fulfil their obligations under the whole breadth of the agreement.[731] However, this does not imply situations, where there is a fundamentally important manifest violation of competence rules, and where the principles of limited responsibility of international organisations are concerned. The link here to the principle of limited responsibility is only to the extent where there is a clear lack of competence to assume an obligation.[732]

In 2014, the European Parliament and the Council adopted a regulation '(…) establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the EU is party'.[733] In other words,

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[728] Frank Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 The European Journal of International Law 723, p. 743.

[729] Eva Steinberger, 'WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO' (2006) 17 European Journal of International Law 837, p. 856.

[730] Dimopoulos, *EU Foreign Investment Law* (n 92), p. 256.

[731] Björklund, 'Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care' (n 708), p. 388.

[732] Steinberger, 'WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO' (n 729), pp. 844-845.

[733] 'European Parliament and the Council, establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party' 2014accessed . Jan Kleinheisterkamp, 'Financial Responsibility in European International Investment Policy' (2014) 63 International and Comparative Law Quarterly 449.

it established a framework for the management of investor-state disputes under these agreements. More specifically, it regulated whether the EU or its Member States should act as a respondent in a claim.

Even though the CCP has been expanding,[734] the mechanism that reserves the determination of competences to the EU remains the most suitable option in terms of investment agreements. In the CETA, in order to determine the respondent to an investment claim, it is mandatory to send a request to the Commission.[735] The Commission should then, within 50 days, take a decision on the respondent, which is binding on the investor-state tribunal.[736] This rule is made to eliminate the risk of conflict between the allocation of competence of the EU and the investor-state tribunal. However, if the Commission fails to provide a decision within the 50 days, it is up for the investor to identify the responding party. In such situation, both the EU and its Member States are, in fact, prevented from contesting the inadmissibility of the claim or lack of jurisdiction of the Tribunal.[737] This can be regarded as a loophole in the system in case the Commission does not act, because, beyond the 50 days limit, any decision taken by the Commission is always subject to judicial review before the CJEU.

On the one hand, such mechanism provides a safeguard for the arbitration process in the sense that the international arbitration mechanism would not suffer and lose the effectiveness because of legal or political struggles on the EU's level. But on the other hand, it is in fact a violation of the principle of autonomy, because even though this can occur in limited circumstances, the investor-state tribunals may confirm the investor's assessment of the respondent, i.e., the investors' assessment on the allocation of competence within the EU. 'The involvement of investment tribunals in the interpretation of EU law and the legal review of EU legal acts *vis-à-vis* broadly defined treaty standards is likely to violate the essential characteristics conferred upon the Court under Article 19 TEU.'[738]

On the contrary, the CJEU could have a significant power to regulate the legality of future agreements and could also adjudicate, i.e. interpret the agreements. It can additionally declare acts of the institutions to be invalid for infringing such agreements and may rule that Member States violated EU law by acting contrary to the legal obligations enshrined in agreements.[739]

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[734] Andrés Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17 European Foreign Affairs Review 491, p. 498.

[735] Tietje, Wackernagel, 'Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration' (n 31), p. 239.

[736] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Ch. 8, Article 8.21.

[737] Ibid, Articles 8.21(5) and (6).

[738] Lenk, 'Investment Arbitration under EU Investment Agreements: Is There a Role for an Autonomous EU Legal Order?' (n 30), p. 159.

[739] Christoph Herrmann, 'The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy' (2014) 15 Journal of World Investment & Trade 570, p. 574.

Regarding the determination of who will be considered respondent between the EU and the Member States, in the CETA, the determination of the respondent may be submitted around 90 days after the request for consultation.[740] In the EUVFTA, the notice of intent to arbitrate triggers an obligation of the EU determine the respondent within two months.[741]

A Member State should act as a respondent to defend its actions in violation of the provisions in the agreement leading to the suffer of a foreign investor.[742] However, the Member State still has the possibility to decline to act as respondent, in case the EU maintains a better technical expertise regarding the matter. However, in this case, the Member State would still remain financially responsible.[743] Moreover, in exceptional circumstances, the EU can act as the respondent in disputes involving treatment afforded by a Member State, if such concerns a specific legal issue where the case also relates to, for example, a claim in WTO; and the EU needs to ensure consistent argumentation.[744] The reason that the regulation of financial responsibility[745] does not establish who will bear the responsibility between the EU and its Member States concerning the treatment given to a foreign investor, is because the responsibility can only be established as a matter of EU law. The determination of allocation of international responsibility can only be determined by international rules, customary or treaty rules, and it cannot be unilaterally imposed to third subjects through the adoption of EU's regulations or other EU acts. This was made further clear in the preamble of the regulation, where it states that the regulation only addresses the allocation of responsibility 'as a matter of Union law', and that it affects, for this reason, only the relationship between the EU and its Member States.[746]

Furthermore, the choice on who will be responsible in relation to international disputes between the EU and its Member State has to be regulated by the division of competence in the EU. This is also made clear in the regulation '[i]nternational responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States'. It moreover emphasises the responsibility of the EU in relation to claims made within its exclusive competence,

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[740] Article 8.21 (1) Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[741] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Article 9.15(2).

[742] Regulation 912/2014 Establishing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals (n 714), preamble, recital 9.

[743] Ibid, preamble, recital 10.

[744] Ibid, preamble, recital 11.

[745] Ibid.

[746] 'European Parliament and the Council, establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party' (n 742), para. 5 of the Preamble.

> '[a]s a consequence, the Union will in principle be responsible for defending any claims alleging a violation of rules included in an agreement which fall within the Union's exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State'.[747]

In other words, the international responsibility is dependent, and has to correspond to the EU's allocation of competence.

Whether the EU has exercised its right to pre-emption needs to be questioned in relation to Regulation 912/2014.[748] The regulation concerns the conduct of investment disputes, and the apportionment of financial responsibility between the EU and its Member States for international investment agreements where the EU is a party. The regulation makes clear that '(…) the adoption and application of this Regulation shall not affect the delimitation of competences established by the Treaties'.[749]

A joint declaration has been made as some kind of interpretative guide, which could be questioned in itself. However, this joint declaration reflects the weakness of the competence issue.[750]

'The adoption and application of this Regulation are without prejudice to the division of competences established by the Treaties and shall not be interpreted as an exercise of shared competence by the Union in areas where the Union's competence has not been exercised.'[751]

For this reason, should '(…) the rules on the apportionment of financial responsibility between the EU and its Member States (…) not affect the allocation of competences under the Treaties'.[752]

2.4.2 EU's International Responsibility

The choice to set the agreements as mixed could have implication in terms of allocation of international responsibility between the EU and its Member States. If this type of agreements instead was concluded within the EU's exclusive competence, this would naturally lead to that the EU would be bearing the international responsibility alone. This would also lead to the conclusion that the Member State will have neither rights nor obligations stemming from this

[747] Ibid, para. 3 of the Preamble.

[748] Regulation 912/2014 Establishing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals (n 714).

[749] Ibid, Article 1.

[750] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40, Article 1 addresses the status of Member State BITs under EU law '[w]ithout prejudice to the division of competences established by the TFEU'.

[751] Regulation 912/2014 Establishing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals (n 714).

[752] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 531.

kind of agreements.[753] In such case, the agreement would bind the Member State only under EU law according to Article 216(2) TFEU.

If the argument was to be put differently, in the event that this type of trade agreements would have been concluded within exclusive competence, it would lead to other issues that need to be discussed. First of all, the Member States would not be parties of the agreement, which would in fact cause issues in relation to the dispute settlement mechanism. In other words, how a Member State could be requested to be the respondent in a dispute settlement mechanism, when it *per se* is not a party to the agreement. Under international law, this would result in issues, since it is clear that an actor who is not part to an agreement cannot breach it.[754] As an example, when a claim is submitted to an arbitral tribunal, it must include '(...) an alleged breach of this Agreement by the European Union or a Member State of the European Union'.[755]

The Member State would not in this sense be responsible for the EU's action. However, nothing would contradict the fact that the EU would remain responsible for the Member State's actions. This means that the breach on the part of the EU may be a consequence of the conduct by a Member State.[756]

In the Opinion of the International Tribunal for the Law of the Sea (ITLOS),[757] it was recognized that:

> (…) an international organization which in a matter of its competence undertakes an obligation, in respect of which compliance depends on the conduct of its Member States, may be held liable if a Member State fails to comply with such obligation and the organization did not meet its obligation of 'due diligence'.[758]

In this case, it was the failure by the organisation to comply with its due diligence obligation, which triggered the question of responsibility. When a Member State acts as the respondent in a dispute settlement procedure operated by the treaty to which it is not a party, it becomes problematic to determine the legal status of that Member State.

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[753] The view that agreements concluded by an organization do not bind Member States is widely recognized. Catherine Brölmann, *The institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007).

[754] Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (n 728).

[755] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part Articles 8-21, Chapter 14, Article 14.4; Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter 3, Article 3.1; EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Section 3, Article 5(2); EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, Chapter 21, Article 21.2.

[756] Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (n 728).

[757] Judgment of the Court of Justice of 6 October 2015, *Council of the European Union v European Commission*, C-73/14, ECLI:EU:C:2015:663.

[758] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) , para. 168.

However, it is not a requirement that a Member State acting as a respondent should bear international responsibility. The mechanism in the CETA, where the EU is allocated the power to decide on who will act as the respondent to the dispute settlement proceedings between itself and its Member States, is a mechanism in which the EU may operate its relationship with the Member State and does not in fact concern the allocation of international responsibility between the two. Such mechanism is an internal matter, where the EU has the power to distribute the burden to defend itself against claims of investors, or to pay adverse awards. In accordance to the view of international law, the Member State would be required to be viewed as similar to an EU's organ, rather than as a Member State. If the EU is the only subject to the agreement, it is the sole bearer of the responsibility. However, the EU can, when operating within this dispute settlement mechanism, decide whether to act directly or through its Member State.

2.4.3 The EU and the Member States Bearing Responsibility Together

Having an agreement concluded as a mixed agreement, such as CETA, leads to that both the EU and its Member States can in principle bear international responsibility for the same breach of the agreement.

Implicitly, it can be concluded that in a dispute settlement where a Member State acts as the respondent, it should be considered that the respondent should bear the international responsibility. This is a logical solution since the arbitrator will be called to judge whether the respondent has breached the agreement and determine the legal consequences that would stem from such responsibility.[759]

It only provides that the EU should inform the investor as to who will act as the respondent. Moreover, the agreement provides certain criteria in case the EU does not inform the investor about the determination of the respondent. '[I]f the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be respondent.'[760] This provision is providing certain indications of the allocation of responsibility. The conclusion can be taken that, in principle, the determination of the respondent is based on the attribution of the contested measure. This is because, '(…) if the measures identified in the notice include measures of the EU, the EU shall be respondent'.[761]

What remains questionable, however, is that it is not entirely clear when a measure can be regarded as 'including measures of the EU'. By comparing it to the Regulation 912/2014, the phrase should be interpreted that the EU must act as the respondent when the measure in

[759] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part 8-18, '(…) an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under the Agreement'.

[760] Ibid, Article 8.21, para. 4.

[761] Ibid.

question is a measure of the Member State implementing a binding act of the EU. In this way, it also reflects the competence-based approach to the allocation of international responsibility, which has been constantly advocated by the EU.

Moreover, even when a specific measure is adopted at EU level, the Member States carry out a clear discretion in terms of their implementation. Most of the tasks established by EU rules are carried out by the Member States it can lead to the EU rarely being held responsible for its action on the international plane. A possible way to solve this issue could be to link responsibility to rule-making competence rather than to actual conduct - an approach currently put forward by the European Commission.[762]

3 The EU Commission Accommodating to Issues on Mixed Agreements

The negative effect stemming from a mixed agreement is important to consider since the EU namely in relation to finding ways in which to avail itself from these negative effects. One can consider two different techniques in practice. The first technique is to formally sign and conclude a so called 'interim agreements on trade and trade-related matters' that constitutes a separate agreement incorporating those parts of the main agreement that are within Community competence. The advantage of this type of practice is that they can easily enter into force since they do not have to be ratified by other Member States. Subsequently, concluding these trade agreements may be easier and quicker in practice.

Secondly, however less frequently used for mixed bilateral agreements is to provisionally apply certain provisions of the agreements. This provisional application has leads to accelerate the entry into force of parts of some mixed agreements. The provisions which are chosen to be subject to provisional application usually are determined through of an exchange of letters and are attached to the Council Decision concerning provisional application.[763]

The CJEU's observation in respect to the need for unity and rapid action in EU's external action has shown not to be met by mixed agreements, because of the underlying procedural difficulties that it entails.[764] The EU was confronted with the situation in relation to the CETA,

[762] Freya Baetens, Gerard Kreijen and Andrea Varga, 'Determining International Responsibility under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know' (2014) 47 Vanderbilt Journal of Transnational Law p. 1-2.

[763] Maresceau, 'A Typology of Mixed Bilateral Agreements' (n 212), p. 13

[764] 1/94, Opinion on World Trade Organization Agreement (n 27) para. 107; Opinion 1/08, Opinion Amending EUs Commitments under GATS (n 402), para. 127.

where the Belgian region, Wallonia, threatened the signing of the agreement,[765] and blocked its ratification. It was proposed that such situation may be repeated in relation to other planned international agreements.[766] There is a clear requirement for the Commission to address this problem.[767]

The idea would be to split trade agreements into two parts: EU-FTA and EU-BIT. On the one hand, the EU-FTA would cover trade related matters as well as the liberalisation of FDI including pre- and post-establishment national treatment, post-establishment most-favoured-nation treatment, and performance requirements that will be regulated by the FTA. On the other hand, the EU-BIT will establish ICS/ISDS, and regulate the protection of direct and indirect investment (including standards of investment protection, such as fair and equitable treatment, expropriation, post-establishment national treatment and most-favoured-nation treatment, performance requirements). When it comes to future trade partners, the Commission recommends negotiating the agreement on the basis of exclusive competence, by deliberately excluding areas which are not within exclusive competence. This is because it would allow the EU to move forward quickly.[768]

4 Intermediate Conclusion

The EU is an international organization of limited legal capacity and according to international law can only assume obligations that fall within its attributed powers from the Member States. It is important to find the clarity between the divisions of competence, specifically in regard to mixed agreement.

The NGFTAs are concluded so far as mixed agreements.[769] Mixity has led to that Member States are provided with an indispensable place within such trade agreements. International trade agreements have to pass through three different stages in the EU's external action, negotiation, conclusion, and execution.[770] Consequently, in a mixed agreement, more questions

[765] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part

[766] Van Der Loo, Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions null' (n 252), p. 2.

[767] Proposed new architecture for splitting EU FTAs and EU investment agreements, (2018) <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2017/08/COM-proposal-splitting-trade-deals.pdf> accessed 12 July 2018European Commission 'Proposed New Architecture for Splitting EU FTAs and EU Investment Agreements' 2018 < <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2017/08/COM-proposal-splitting-trade-deals.pdf> > accessed 12 July 2018

[768] European Commission, Communication on a Balanced and Progressive Trade Policy to Harness Globalisation (n 171).

[769] Reservation should be provided to the separation of the Singapore agreement, where one part is tconcluded as mixed and the other could be concluded in exclusive competence.

[770] C-25/94, Commission v Council (n 330), para. 48.

occur in relation to the Member States' participation in the different stages, notably through the concerns of the EU as a treaty-making actor, and the effective implementation of the CCP.

These concerns are important since they are directly linked to legitimacy and democratic scrutiny, and more generally, to the role of the domestic parliaments in the EU's external relations.

The easiest option for the EU would be EU-only agreements; however, this would lead to decreased decision-making power for the Member States and the Council.

CHAPTER V
AUTONOMY OF THE EU LEGAL ORDER IN RELATION TO THE DISPUTE SETTLEMENT MECHANISM OF THE NGFTAS

This chapter demonstrates how important the difference among agreements in regard to investment protection is, since the agreements, even though similar in nature, differ in terms of content and execution. For the development of the EU legal order, the concept of autonomy was instrumental. However, only much later, the concept started to develop as a concrete principle of EU external relation law.[771] Firstly, the issues originating from the newly proposed Investment Court System (ICS) will be addressed, since they are significantly different in comparison to former investment arbitration systems. These issues are then contextualised in relation to the fact that the ICS is an arbitration system operating entirely outside of the EU's judicial framework and can potentially deal with issues in relation to EU law.

Thereafter, it is considered how the foreign investors can challenge EU acts and decisions before an ICS; in such circumstances, the tribunals may be faced with questions regarding EU law. Thus, the CJEU could be adversely affected, and this in turn provides challenges to the uniform interpretation and effectiveness of EU law, and the autonomy of the EU legal order.

1 The Investment Court System in NGFTAs

Formerly, the investment dispute settlement system was developed in order to facilitate foreign direct investment in developing countries, which lack an adequate judicial system and protection. To move investment arbitration from *ad hoc* arbitration to an investment court could clearly facilitate investment arbitration.[772]

When settling investment disputes through arbitration, specifically between a state and an investor, the standard method has become investor-state arbitration. This is because, through this method, the investor gains access to an efficient procedure; and this way, the host state benefits by attracting more foreign investors.[773]

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[771] Jed Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Bloomsbury Hart Publishing 2017), p. 295

[772] European Commissioner for Trade 'Concept Paper, Investment in TTIP and Beyond – the Path for Reform. Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court' 2015 <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 12 March 2018.

[773] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, vol 2nd edn (Oxford University Press 2012), pp. 220-221.

In general, through arbitration, when there is an issue concerning foreign investments, there are three different possibilities for foreign investors: to bring a claim before an investor tribunal, to bring a claim before a domestic court based on domestic or international standards of protection, or to bring a claim through private commercial arbitration.

The ISDS was established to provide further protection to foreign investors, who often operate in the form of multinational firms. In this regard, if a foreign firm considers that it has been exposed to an unfair treatment in the host country, it can bring up the issue before a dispute resolution body.

1.1 The Difference Between ICSID and ICS Mechanisms

International investment agreements include reference to the International Centre for the Settlement of Investment Disputes (ICSID). The way in which some of the ICSID rules are formulated makes it difficult to include them in EU's agreements. For example, the Additional Facility Rules[774] cover disputes that concern only investors and states, and not the EU.[775] These rules do not give the investors the full range of legal protection that is available under the ICSID Convention but allow them to benefit from its institutional structure.[776]

There are also other procedural rules related to investment dispute frameworks. Commercial arbitration rules, such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the arbitration rules of the International Chamber of Commerce (ICC), and the Stockholm Chamber of Commerce, can be used for the settlement of investment disputes. The rational to include other systems of investor-state adjudication is to ensure impartiality, and for the disputes not to be affected by politics. Tribunals of commercial arbitration are competent to decide on their own competence.[777] For the ICSID tribunals, Article 41(2) ICSID applies.[778] The tribunal decides on whether it has jurisdiction to hear the dispute,

[774] Aurélia Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 ICSID Review - Foreign Investment Law Journal Volume 427, p. 428. The ICSID Additional Facility, created 1978, offers arbitration, conciliation, and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention.

[775] Markus Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (2014) 15 Journal of World Investment & Trade 551, p. 559, In this regard, it is important to note that the ICSID rules apply mainly to cases where either the state party to the dispute or the state of the investor's nationality is signatory to the ICSID Convention.

[776] August Reinisch and Loretta Malintoppi, 'Methods of Dispute Resolution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), p. 706.

[777] UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 [1985] United Nations Commission on International Trade Law, Article 23, 16(1)(1).

[778] Dolzer, Schreuer, *Principles of International Investment Law* (n 773), p. 241; Chester Brown, 'Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law' in Stephan W Schill (ed), *International investment Law and Comparative Public Law* (Oxford University Press 2010), pp. 666-668.

and subsequently renders the award. For states which are signatories to the ICSID Convention, the ICSID's awards are final and automatically enforceable in the territory of the state.[779]

In very limited circumstances, it is possible to have a revision or annulment of the award given in the ICSID procedure.[780] Moreover, it is not allowed for an award to be appealed on substantive grounds; and domestic courts are entirely excluded from this process.

1.2 Dispute Settlement System in the NGFTAs

The EU further seeks to introduce an Investor-State Dispute Settlement (ISDS) system into the NGFTAs. It considers it necessary arguing that its '(…) absence would in fact discourage investors and make a host economy less attractive than others.'[781]

In fact, a model based on the expression 'one size fits all' would be, according to the Commission, 'neither feasible nor desirable'. The reason hereto is that such standard is not static but rather dynamic, and the development of the EU's action concerning investment should guide such standard through the negotiation.[782] The flexibility of negotiation becomes even more important in relation to developing countries, which are keen to keep their regulatory autonomy.

EU's institutions seem to neglect to determine whether primary EU law allows the inclusion of investor-state dispute settlement provisions in EU's agreements, and the conclusion of international agreements concerning ISDS, such as the ICSID Convention.[783] As a general rule, the EU's competence to enter into an international agreement contains provisions for the settlement of disputes arising from its application and is a self-evident implication of its legal personality. However, dispute settlement mechanisms adopted in EU's agreements must conform to the jurisdictional limits set by Opinion 1/91,[784] which was further clarified in Opinion 1/00 and Opinion 1/09,[785] emphasising the link between dispute settlement, and the autonomy of the EU legal order.

The CJEU recognizes that the

[779] Article 53 ICSID Convention, Regulations and Rules [2006] ICSID/15.

[780] Articles 51 and 52, ibid.

[781] European Commission, Communication Towards a Comprehensive European International Investment Policy (n 53), pp. 9-10.

[782] Ibid, p. 6.

[783] Article 67 ICSID Convention, Regulations and Rules, Convention only states are allowed to accede to it, consequently the EU cannot become a contracting party unless the Convention would be amended. The question of EU competence to accede to the ICSID Convention is different from the question concerning the eligibility of the EU as a supranational organisation to accede to it as a matter of international law.

[784] 1/91, Opinion on European Economic Area EEA Agreement I (n 447).

[785] Opinion of the Court of Justice of 18 April 2002, *(Agreement between the European Community and Non-Member States on the Establishment of a European Common Aviation Area)*, 1/00, EU:C:2002:231, Opinion 1/09, Opinion Establishing European Patent Court (n 448).

> '(…) competence of the European Union to conclude international agreements necessarily entails the power to submit to the decisions of a body which, whilst not formally a court, essentially performs judicial functions, such as the Dispute Settlement Body created within the framework of the WTO Agreement'.[786]

However, also in Opinion 2/15, the CJEU does not engage in whether the dispute settlement is compatible with EU law, since it is outside of its scope.[787]

Thus, the EU's institutions need to be very careful when designing future EU's IIAs, in order to ensure that investor-state arbitration respects the jurisdiction of the Court of Justice over matters of EU law. The fact that Article 207 TFEU covers all aspects of FDI regulation is not sufficient to justify the EU's action that covers the entire spectrum of foreign investment regulation. The limitations that are intrinsic in Article 207 TFEU, as well as in other provisions of the TFEU, require a more elaborate analysis of the exact scope of the EU's powers, based on the totality of relevant provisions.

However, if we consider the KOREU as an example, the FTA does recognize that it may be desirable to conclude a further agreement on investment protection in the future. In this regard, Article 17.6 provides that:

> With a view to progressively liberalising investments, the parties shall review the investment legal framework, the investment environment and the flow on the investment between them consistently with their commitments in international agreements no later than three years after the entry into force of this agreement and at regular intervals thereafter.[788]

The KOREU also implies that this review shall include the possibility of opening negotiations on general principles of investment protection.[789] This is a clear indication that a review will not be limited to assessing the effectiveness of the existing provisions, but that the scope of the investment provisions may be extended to include the different types of protection standards that are currently found in BITs, such as fair and equitable treatment and the regulation of expropriation. Indeed, as noted, it is only through the negotiation of such provisions that a level playing field can be achieved. Another factor, which may drive the conclusion of a comprehensive agreement, achieves full parity with the FTAs already concluded by competitors' nations.[790]

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[786] 2/15, Opinion of Singapore FTA (n 211), para. 289.

[787] Ibid, paras. 300-301.

[788] EU-Korea FTA, Article 7.16(2).

[789] Ibid, Article 7.16(2).

[790] European Commission External Trade 'Global Europe Competing in the World' (n 3).

Given that the FTAs concluded by Korea with other states already contain standards of investment protection,[791] it is likely that EU's investors would want to achieve similar protection, from which they can all benefit.[792] It is not only investors that are calling for the EU to exercise its new competence in the field of foreign direct investment, but also the European parliament has called for the Commission to take the necessary steps towards a progressive replacement of all existing bilateral agreements on investment of Member States with new EU's wide agreements.[793]

In the CETA, the definition of investment includes an 'objective' component recently recognized in international law, which also requires that the claimant's activity in the host state meets certain economic characteristics. When the investment meets the definition in the investment agreement, the case can be brought to the tribunal.

Investment is furthermore defined as '(...) every kind of asset that an investor owns or controls, directly or indirectly that has the characteristics of an investment'.[794] This also includes the duration of the investment, commitment of capital or other resources, the expectation of gain or profit and/or the assumption of risk. For example, an enterprise, shares, bonds, loans, intellectual property rights and moveable property are example of what can constitute an investment.

One of the objectives of the CETA is to eliminate 'treaty shopping' in relation to investment protection. Treaty shopping refers to when a claimant establishes standing, based on a 'mailbox' subsidiary, to benefit from the best investment protection. In order to circumvent this, the CETA provides the definition of investor as an enterprise of one of the parties to the agreement, which must conduct 'substantial business activities' in the territory where it is constituted. Effectively, this prevents shell companies without substantial business activities from benefitting through claims under CETA's ISDS.

1.3 Dispute Settlement Provisions in NGFTAs

The ICS was included in the 2015's TTIP proposal,[795] and the CETA.[796] If the agreement would not contain any provision of dispute settlement mechanism, the only available routes for

[791] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Chapter 10.

[792] BusinessEurope, 'Priorities for External Competitiveness 2010-2014: Building on Global Europe' (2010) An Agenda for the EU in 2010-2014 <https://www.businesseurope.eu/sites/buseur/files/media/imported/2010-00538-E.pdf> accessed 13 March 2018., p. 5.

[793] European Parliament, Legislative Resolution on Establishing Transitional Arrangements for Bilateral Investment Agreements (n 40).

[794] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Chapter 9, Article 1.

[795] European Commission Textual Proposal Customs and Trade Facilitation, EU-US TTIP Negotiations [2015].

[796] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

foreign investors wishing to sue the EU and/or its Member States, are the state-to-state arbitration and domestic judicial proceedings.[797] The same applies to European investors wishing to sue the host partner state.

The problem with this type of dispute resolutions is that once a claim is initiated before a tribunal, a domestic court can no longer intervene in the procedure. Such process may encourage investors to circumvent the judicial prerogatives of the CJEU.

1.3.1 The Establishment of ICS in NGFTAs

The former ISDS procedure is criticized for that the investors have too much influence over the arbitration process. From this angle, the ICS can be considered as a big reform in relation to the ISDS system. Moreover, the ICS has a significant political influence over the dispute resolutions. The ISDS is designed to have an investor-state dispute resolution, which is de-politicization, where politicians and governments are not allowed to be involved in the procedures.[798]

The CJEU establishes that international agreements form an integral part of the EU legal order,[799] and require consistent interpretation of secondary EU law.[800] In essence, the task of the CJEU is to review the legality of the actions made by EU's institutions or Member States, in the light of international agreements.[801] In this regard, the CJEU is limited in its interpretation of an EU legal act. This means that in order for the CJEU to view the compatibility of such act with an EU's investment agreement, the investment tribunal needs to have already rendered an award. The investment tribunal is, therefore, limited to adjudicate disputes, which only concern the interpretation and application of investment agreements; and the CJEU is not naturally bound to follow investment awards, where the incompatibility only concerns the agreements. The investment standards carry the potential to affect a wide range of EU's policies, because of its extensive reach. The WTO dispute settlement body '(…) would inevitably determine the Court's interpretation of the corresponding rules of Community law. Such an outcome would jeopardise the autonomy of the Community legal order in the pursuit of its own objectives.'[802]

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797 Daniele Gallo and Fernanda G Nicola, 'The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication' (2016) 39 Fordham International Law Journal 1081.

798 Luca Pantaleo, 'Lights and Shadows of the TTIP Investment Court System' (2016) 1 CLEER Paper Series <https://ssrn.com/abstract=2782008> accessed 8 March 2018., p. 82.

799 Article 216(2) TFEU.

800 Judgment of the Court of Justice of 10 September 1996, *Commission of the European Communities v Federal Republic of Germany*, C-61/94, ECLI:EU:C:1996:313, para. 52, Judgment of the Court of Justice of 1 April 2004, *Bellio F.lli Srl v Prefettura di Treviso*, C-286/02 ECLI:EU:C:2004:212, para. 33,C-344/04, IATA and ELFAA (n 625), para. 35. Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (n 626), pp. 1309-1311.

801 Eeckhout, *EU External Relations Law* (n 260), p. 292; Herrmann, 'The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy' (n 739), p. 574.

802 Judgment of the Court of Justice of 27 September 2007, *Ikea Wholesale Ltd v Commissioners of Customs & Excise*, C-351/04, ECLI:EU:C:2007:547, paras. 78 and 79.

The investment tribunal's core task is to substantively assess the compatibility of legal acts with the broad investment protection standards established under the investment agreement. Investment tribunals do not, in these circumstances, replace domestic or EU courts in the application of EU law, in difference to the European Patent Court (EPCt) for example. According to Opinion 2/13, incompatibilities with the Treaty are directly invoked if an international agreement empowers a judicial body other than the CJEU with the assessment of EU law *vis-à-vis* broadly defined international standards.[803] As far as the interpretation of the investment agreement is concerned, investment awards are considered to bind the CJEU, and consequently extend the interpretation of secondary EU law in the light of that agreement. The function of the investment arbitration is to review EU legal acts *vis-à-vis* investment standards that are stipulated in the investment agreement.

The established judicial bodies are an indispensable element of the EU's external relations,[804] and the powers transferred under the Treaties should remain unaltered.[805] It remains within the responsibilities of the CJEU to review the legality of EU law by virtue of Article 19 TEU.[806] The role of assessing the EU legal act is sometimes taken over by the investment agreements.[807] The CJEU would be effectively restrained by the investment tribunal interpretation when exercising its judicial function under Article 19 TEU. However, the fact that direct effect is excluded from these recent types of agreements[808] essentially limits the EU's involvement through the CJEU in interpreting the agreement, since the agreement will not be fully integrated in the EU legal order.[809] In practice, this is the case in the CETA, for example, where the agreement excludes private rights.[810] Investors are here also excluded from initiating treaty-based claims before domestic courts or the CJEU. However, this would not prevent legal challenges to secondary law, and would therefore represent an insufficient safety mechanism.

When contracting states express their consent to arbitration in ISDS, it merely shows that the investor-state tribunal is fulfilling the function of international adjudicative review of

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[803] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449) , para. 246.

[804] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), para. 40; Opinion 1/09, Opinion Establishing European Patent Court (n 448), para. 74.

[805] Opinion 1/09, Opinion Establishing European Patent Court (n 448), para. 76; 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 183.

[806] Herrmann, 'The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy' (n 739), p. 574.

[807] Nikolaos Lavranos, 'The ECJs Relationship With Other International Courts' in Karsten Hagel-Sorensen and others (eds), *Europe - the New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djoef Publishing 2010), p. 399. Lavranos remarks that the pre-Bosphorus case law of the ECtHR also reflects a de facto review of EU legal acts vis-à-vis the ECHR.

[808] Stephan W Schill, 'Opinion 2/13 - The End for Dispute Settlement in EU Trade and Investment ' (2015) 16 Journal of World Investment & Trade 379, p. 385; Aliki Semertzi, 'Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51 Common Market Law Review 1125.

[809] Schill, 'Opinion 2/13 - The End for Dispute Settlement in EU Trade and Investment ' (n 808), p. 385.

[810] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, chapter 33, Articles 14-15.

domestic legislation.[811] In fact, the provisions are designed to benefit a broad non-homogeneous group of elements that have no prior relationship with the state in regard to the investment.[812] The consent to start investment arbitration comes from the contracting states' sovereign power.[813] Consequently, investment arbitration includes broader and systematic implications on the regulatory policy-space of contracting states other than commercial arbitration. The investment tribunals under the EU's investment agreements will express themselves on the compatibility of the regulatory acts of the EU or its Member States with broad and extensive investment standards. This means that investment tribunals exercise an adjudicative review of the legality of EU Treaties.[814]

The ISDS is based on principles of fairness and impartiality to guarantee the right of governments to regulate in the public interest. In the ICS, the foreign investors are able to circumvent domestic courts, and sue States directly through the established international tribunal. Moreover, the ICS does not grant rights to the public or victims of investors' actions; this naturally means that affected individuals do not have recourse to seek. Foreign investors can also choose not to engage in the ICS, but rather pursue the resolution of disputes through the ISDS. However, once they engage in the latter, they cannot seek resolutions through the former.

1.3.2 The Composition of the ICS

The composition of the Court is what differentiates the ICS from traditionally based ISDS arbitration mechanism.[815] The investment court systems of the EU–Vietnam FTA[816] and CETA have both a composition of two-level judicial structure. A two-level judicial structure simply refers to a system where, after the first judicial instance, there is a possibility to appeal. In the

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[811] Stephan W Schill, 'International Investment Law and Comparative Public Law - An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010), pp.10–17; Gus van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 European Journal of International Law 121.

[812] Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007), p.63, Harten, Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (n 811), p. 128; Dolzer, Schreuer, *Principles of International Investment Law* (n 773); Brown, 'Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law' (n 778), pp. 85-86. There is a clear distinction between investment contracts and investment treaties. How the dispute resolution clauses in investment contracts will be finalized depend on the negotiation process and the different parties bargaining power. It is the investor that has the major influence over the investment contract and it would also be in the interest to protect its foreign investment as much as possible. However, in investment treaties the investor has no influence over the applicable provisions of the treaty.

[813] Schreuer, 'Consent to Arbitration' (n 371), p. 835; van Harten, *Investment Treaty Arbitration and Public Law* (n 812), p. 64.

[814] Semertzi, 'Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (n 808), p. 1138.

[815] Hannes Lenk, 'An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada' (2016) 1 European Papers <http://www.europeanpapers.eu/en/europeanforum/investment-court-system-new-generation-eu-trade-and-investment-agreements> accessed 8 March 2018., p. 667.

[816] EU-Vietnam Free Trade Agreement [2016].

EU–Vietnam agreement, the first tribunal is composed of nine members, whereas the Appeal Tribunal is composed of six members.[817] The EUVFTA clearly states that

> (…) the Trade Committee shall, upon the entry into force of this Agreement, appoint nine members of the Tribunal. Three of the members shall be nationals of a Member State of the European Union, three shall be nationals of Vietnam and three shall be nationals of third countries.[818]

However, it is furthermore explained that it is upon the party to choose who to appoint. In this way, the party to the agreement may as well choose to propose a member who has another nationality or citizenship. Either way, the members chosen by the party will be considered to be nationals or citizens of that party in the context of the EU–Vietnam FTA Article 12.12.[819]

Moreover, in the context of the Appeal Tribunal, it is decided in the EU–Vietnam agreement that the tribunal shall be composed of six members out of which '(…) two shall be nationals of a Member State of the European Union, two shall be nationals of Vietnam and two shall be nationals of third countries.'[820]

In the case of the CETA, the first instance tribunal has 15 members. The CETA provides that '[f]ive of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries.' Additionally, in line with the EUVFTA in terms of proportion, it is further indicated that up to five members proposed by the party may be of any nationality and shall still be considered as nationals of the party for the purpose of this agreement.[821]

Regarding the composition of the CETA Joint Committee, the agreement doesn't include clear details. The member shall be appointed by a decision of the CETA Joint Committee.[822] The members of the appellant tribunal shall have similar qualification as those appointed for the tribunal.[823] This means that they shall possess the qualifications required in their respective countries for appointment to judicial office or jurist of recognised competence. Furthermore, they should be equipped with expertise in public international law. It is moreover desired that the members should have expertise in international investment and trade and dispute resolution

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[817] Ibid, Chapter on Trade in Services, Investments and E-Commerce, Sub-Chapter II on Investments, Article 12, para. 2.

[818] EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, Section 3, Resolution of Investment Disputes, sub-section 4, Article 12.2.

[819] Ibid, Chapter on Trade in Services, Investments and E-Commerce, in the EU-Vietnam FTA, Article 12.12.

[820] EU-Vietnam Free Trade Agreement, Chapter on Trade in Services, Investments and E-Commerce, Sub-Chapter II on Investments, Article 13, para. 2.

[821] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.27, para. 2; Article 8.28, para. 7(f).

[822] Ibid, Article 8.28, paras. 3-4.

[823] Ibid, Article 8.30, para. 1.

linked to international investment or international trade agreements; though, this is not an obligation.[824] Furthermore, the members need to have certain ethics requirement, such as being independent and not affiliated with any government. It is, however, clarified that government affiliation does not mean having remuneration from the government. It can be deducted from the context that it refers more to a political affiliation to the government. The members should not also take instructions from other organs, or even participate in consideration of any disputes, which may create direct or indirect conflict of interest.[825]

Consequently, it is possible to draw the conclusion that neither the CETA nor the EU–Vietnam FTA refer to members of the tribunal as judges. However, the CETA manifests that the members should be appointed by judicial office or jurist of recognised competence, which only means that they should possess a more excelled knowledge in order to judge on certain circumstances.

Interestingly, the proposal for the TTIP did not word the same. In relation to the composition of the arbitral panel, it discussed the selection of 'judges'.[826] Referring to the arbitrational panel as 'judges' could change the context, specifically in the sense that in normal arbitration procedure, when the panel is elected, it is not necessary that its members are judges, they can be practitioners, academics, or politician. Their legal background is not of importance for the panel.

1.3.2.1 Selection Process of the Panel Members

As mentioned earlier, in the procedure for selecting the members of the panel, there is a clear categorization that is based on nationality; but the appointment system itself is not nationality based. If we take the EUVFTA as an example, the members that Vietnam has appointed were not required to be Vietnamese.[827] This selection principle is also provided in the CETA.[828] In both agreements, the selection of the members of the investment court is assigned to a special committee, which should be established under the agreements. This

[824] Ibid, Article 8.27, para. 4.

[825] Ibid, Article 8.30, para. 1.

[826] European Commission Textual proposal to the EU negotiaion of Transatlantic Trade and Investment Parternship (TTIP) [2016], EU's proposal for a text on trade in services, investment and e-commerce, Chapter II Investment, Section 3 Resolution of Investment Disputes and Investment Court System, Chapter, Article 9 referring to Judges on the Tribunal. However in Article 10 in relation to the Appeal Tribunal there is no reference to judges but rather to 'members' of the Appeal Tribunal.

[827] EU-Vietnam Free Trade Agreement: Agreed text as of January 2016

[828] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

committee is referred to as the Trade Committee[829] in the EUVFTA,[830] and as the CETA Joint Committee in the CETA.[831] These committees are composed by the EU Trade Commissioner, and the Minister for International Trade of Canada in the CETA[832], and the Minister for Trade and Industry of Vietnam in the EUVFTA.[833]

For a decision to be made in these committees, it should be based on mutual consent. However, in the EUVFTA, there are other parties involved in the appointment of members to the tribunal and the appeal tribunal.[834] In fact, this is accomplished upon the recommendation to the Trade Committee by the Committee on Services, Investment and Government Procurement.[835] This differs from the CETA, since it is the CETA Joint Committee only that takes decisions on the appointment of members, with no other committee providing its input to the final decision.[836] Consequently, it is possible to assume this type of appointment in the ICS as based on more of a compromise through political organs, than just a selection process of the different contracting parties.[837]

1.3.2.2 The Party Autonomy of the Arbitrational Panel

The principle of party autonomy is present in traditional ISDS mechanism due to its composition of the arbitrational panel. In the ISDS appointment process of the arbitrators in the arbitrational panel, the investor is empowered to actively participate in deciding on which arbitrators should be selected for the hearing of the case.[838]

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[829] It is also referred to as the Trade Committee in the KOREU. Delegation of the European Union to the Republic of Korea '7th meeting of the Trade Committee of the EU-Korea Free Trade Agreement (FTA) ' <https://eeas.europa.eu/delegations/south-korea/38576/7th-meeting-trade-committee-eu-korea-free-trade-agreement-fta_en> accessed .

[830] EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, Chapter 17, Institutional, General and Final Provisions, Article 1.1 "The Parties hereby establish a Trade Committee comprising representatives of the [European] Union and Vietnam.

[831] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 8.27, para. 2. "Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries".

[832] Ibid, Article 26.1, The Parties hereby establish the CETA Joint Committee comprising representatives of the European Union and representatives of Canada. The CETA Joint Committee shall be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees.

[833] EU-Vietnam Free Trade Agreement: Agreed text as of January 2016 Institutional, General and Final Provisions, Chapter 17, Article 1.1. The Parties hereby establish a Trade Committee comprising representatives of the [European] Union and Vietnam.

[834] Ibid, Chapter 8, Trade in Services, Investment and E-Commerce, Sub-section 4, investment tribunal system, Article 12, para. 2. "...The trade committee shall…appoint nine Members of the Tribunal. Three of the Members shall be nationals of a Member State of the European Union, three shall be nationals of Vietnam and three shall be nationals of third countries".

[835] Ibid, Chapter 8, Trade in Services, Investment and E-Commerce sub-section 5, conduct of proceedings, Article 34, para. 2.

[836] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.28 para. 7. The CETA Joint Committee is competent to take decision in administrative and organisational matters regarding the functioning of the Appellate Tribunal. The overall task of the CETA joint committee is explained in more detail in Article 26.1, paras. 3-4.

[837] Robert W Schwieder, 'TTIP and the Investment Court System: A New (and Improved) Paradigm for Investor-State Adjudication' (2016) 55 Columbia Journal of Transnational Law 178, There is a risk, discussed in this article that the Committee would instead be absorbed by the State's interest within its decision making.

[838] Pantaleo, 'Lights and Shadows of the TTIP Investment Court System' (n 798), pp. 80-81.

In relation to the selection system of arbitrators, the ICS differs completely from the traditional ISDS. In the ICS system, the tribunals are categorized evenly in accordance to their affiliation to the contracting parties.

1.3.3 Procedural Requirements for the ICS

The ISDS permits direct access to international arbitral tribunal in order to enforce the provisions of an agreement. Any investor can pursue an investment dispute when the ISDS is included in the agreement. The investor is only required to initiate the claim because of the implied consent, which stems from the signed agreement.[839] Each agreement contains its specific procedural rules that govern the arbitration procedure. From a legal perspective, the decision-making procedure enfolds two interesting perspectives to discuss i.e. the three-layered decision procedure as well as the possibility to appeal.

1.3.3.1 Three-Layered Decision Procedure

The panel in the ICS further decides the cases in a three-layered organized system. This type of system is put into place in order to respect the overall composition of the panel. The decision is then chaired by a third country member.[840] The president is selected by lot from the pool of third country members.[841] It is thereafter the responsibility of the president of the tribunal to appoint the members to the individual panels. In this regard, neither the investor nor the respondent will have any impact whatsoever of the composition of the panel, which will hear the dispute.

In relation to the appeal tribunal, it is less detailed in the CETA. The agreement provides no provision related to the composition of the appeal tribunal. In regard to the procedural settings, the Vietnam's agreement embraces the division of three of the tribunal's composition.[842]

However, the procedural setting of the courts in the division of three is confirmed in the CETA;[843] it refers to the '(…) three randomly appointed Members of the Appellate Tribunal'.[844] Additionally, the Joint Committee shall adopt a decision in relation to the administrative and organizational matters of the functioning of the Appellate Tribunal.[845]

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[839] Dolzer, Schreuer, *Principles of International Investment Law* (n 773), p. 257.

[840] EU-Vietnam Free Trade Agreement, Article 12, para. 6. Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.27, para. 6.

[841] EU-Vietnam Free Trade Agreement, Article 12, para. 8, EU-Vietnam FTA; Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.27, para. 8.

[842] EU-Vietnam Free Trade Agreement, Article 13, para. 8.

[843] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.28, para. 5.

[844] Ibid, Article 8.28, para. 5.

[845] Ibid, Article 8.28, para. 7.

Consequently, it is not very clear whether the situation is the same as in the EUVFTA, where the composition of the panel hearing a particular case is determined by a third country member of the Appellate Tribunal, or if it is by the CETA Joint Committee through mutual consent.

1.3.3.2 The Possibility to Appeal

One of the most important features of the proposed ICS is the establishment of an appellate mechanism. One of the most criticised areas of ISDS mechanisms has been the lack of effective judicial review of arbitral decisions.[846]

Generally, an appeal mechanism would enhance credibility, legitimacy, coherence and foreseeability of the ISDS system. However, at the same time, such permanent court system risks increasing (already existing) discrepancies in investment awards.[847]

According to ICSID Articles 52 and 53, investment awards are subject to an internal judicial control, in which the annulment committee may decide that the award should be annulled either only in part, or in full.

Similar to the appellant mechanism in the ICS, there is a mechanism in arbitral processes, under the ICSID convention, that provides a special annulment procedure, according to which special *ad hoc* panels may annul ICSID awards. Such annulment procedures exclude recourse to any other mechanisms challenging the ICSID award.[848]

The appeal mechanism can be problematic from both, an international law perspective, and also an EU law perspective. It would be contrary to the ICSID convention, since the provisions of the new generation of FTAs are broadening the annulment mechanism in the ICSID conventions through the newly introduced appeal mechanism. The appellant tribunal may revise 'provisional awards' of the Tribunals (of first instance), not only on the grounds for an annulment, but also for errors in law, and on the assessment of facts (although only to a limited extent).[849]

Whether such contradiction would constitute a permissible *inter se* modification under the criteria of Article 41 VCLT can be questionable. Such modification could be considered

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[846] World Investment Report 'Reforming International Investment Governance' 2015 <World Investment Report 2015 Reforming International Investment Governance> accessed 25 March 2017, p. 150.

[847] Schwieder, 'TTIP and the Investment Court System: A New (and Improved) Paradigm for Investor-State Adjudication' (n 837).

[848] Article 53(1) ICSID Convention, Regulations and Rules, "The award … shall not be subject to any appeal or to any other remedy except those provided for in this Convention".

[849] European Commission Textual proposal to the EU negotiaion of Transatlantic Trade and Investment Parternship (TTIP), Article 29(1), section 3, EU's proposal, '(…) (a) that the Tribunal has erred in the interpretation or application of the applicable law; (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or, (c) those provided for in Article 52 of the ICSID Convention, insofar as they are not covered by (a) and (b).'; Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.28(2), EU-Vietnam Free Trade Agreement, Investment Chapter, section 3, Article 28(1).

'(…) incompatible with the effective execution of the object and purpose' of the ICSID Convention as a whole'.[850] If the revision of awards would be constituted on broader grounds, it would lead in turn to a prolongation of proceedings. However, having broader ground would also lead to more coherent interpretation and application of the underlying investment rules. Since an appeal mechanism was in fact discussed in the secretariat discussion paper,[851] it could mean that the concept would not in fact be completely contrary to the ICSID ISDS.[852]

Annulment can be considered in situations where the panel is not constituted properly, when there is manifest excess of power, corruption, serious departure of fundamental rule of procedure, or in situations where there is a failure to provide reasons.[853]

Non-ICSID awards can be set aside by domestic courts.[854] Domestic arbitration acts provide only limited grounds for setting aside awards and do not make a substantive review of the award. Such grounds could be personal misconduct, procedural improprieties, and the lack of a valid arbitration agreement.[855]

The ICS similarly provides for possibilities to appeal against an award rendered by the tribunal. This is possible in situations where it has been considered that the interpretation or application of the applicable law was erred, or when there is a manifestly error in the appreciation of the facts, including the relevant domestic law, which in the case of the EU as a contracting party, comprises also EU law.[856]

The Vietnam FTA stipulates for a large area of competence for the appeal tribunal to, in its full or in parts, '(…) modify or reverse the legal findings and conclusions' of the Tribunal.[857] However, this is not the case in situations where the facts of the case do not allow for a final

[850] An agreement on an inter se modification of the Convention between certain of its parties to allow for an appeals mechanism also would not be without difficulties.

[851] ICSID International Centre for Settlement of Investment Disputes, 'Possible Improvement of the Framework for ICSID Arbitration' (2004) Secretariat Discussion Paper October 22 <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> accessed 18 March 2018.

[852] While not analysing the compatibility under the Article 41 VCLT requirements in detail, the ICSID Secretariat clearly envisaged the possibility of an inter se agreement. ICSID ibid, Annex, para. 2.

[853] Catharine Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (2017) TDM1 Transnational Dispute Management <https://ssrn.com/abstract=2711943 > accessed 8 March 2018., pp. 9-10.

[854] Dolzer, Schreuer, *Principles of International Investment Law* (n 773), pp. 300-301.

[855] This could be the case in many domestic legal orders, for example in Sweden, Swedish Arbitration Act, SFS 1999:116, and Section 34.

[856] EU-Vietnam Free Trade Agreement, Article 28, para. 1. Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.28, para. 2, Pantaleo, 'Lights and Shadows of the TTIP Investment Court System' (n 798), pp. 89-90, Pantaleo emphasises the differences between the underlying objectives of appeal mechanism of a private and public purposes. The appeal tribunal in the ICS includes a broader review, where the appreciation of facts, goes beyond what is necessary to guarantee overall credibility, legitimacy and coherence of the dispute resolution mechanism.

[857] EU-Vietnam Free Trade Agreement, Article 28, para. 3. A decision of the Appeal Tribunal is considered final in accordance with ibid, Article 29, para. 3.

decision to be taken; in such circumstances, the case is to be referred back to tribunal.[858] The appeal procedures in the CETA are decided by the Joint Committee.[859] In relation to the TTIP proposal, the appeal procedure has a more complex setting.[860]

1.4 Enforcement of Investment Awards in NGFTAs

The awards have been carefully drafted by the negotiators in view of the possibility for an ICS award to appear as an ICSID award. However, it has to be assured that the other ICSID contracting parties would recognize such as ICSID awards enforceable under the ICSID Convention. The modifications made in the ICS can be considered as modifications compatible with the ICSID Convention pursuant to Article 41 VCLT[861]; in other words, whether the awards can be qualified as awards under the New York Convention regarding ICS as a form of arbitration, and the outcome of the ICS dispute settlement as constituting enforceable awards. The enforcement of ICS awards is also dependent on the provisions of the underlying agreement to which third parties are not bound.[862] The enforceability of the ICS awards has been given a lot of attention in the EU's negotiations. As concluded in the final agreements, awards cannot further be subject to '(…) appeal, review, set aside, annulment or any other remedy'.[863]

It is in fact the enforcement system that is the crucial advantage of the ICSID arbitration. In ICSID arbitration, the awards are binding and compel the parties to '(…) abide by and comply with the terms of the award'.[864]

The exclusive nature of the ICSID enforcement rules provides that the grounds for non-recognition and non-enforcement under the New York Convention cannot be raised before national courts.[865] Moreover, each contracting state to ICSID arbitration '(…) shall recognize

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[858] Ibid, Article 28, para. 4.

[859] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.28, para. 7 (b).

[860] Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (n 853), pp. 11-12. The question whether the TTIP appeal tribunal has the power of the final decision is important. However, it seems that the cases are to be referred back to the tribunal where the tribunal will have the binding and detailed instructions as to the modification or reversal of the provisional award.

[861] Article 41.1 Vienna Convention on the Law of Treaties 'Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: The possibility of such a modification is provided for by the treaty; or The modification in question is not prohibited by the treaty'.

[862] Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (n 853), p. 27.

[863] European Commission Textual proposal to the EU negotiaion of Transatlantic Trade and Investment Parternship (TTIP), section 3, Article 30(1), Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.28(9)(b). EU-Vietnam Free Trade Agreement, Investment Chapter, Section 3, Article 31(1).

[864] Article 53(1) ICSID Convention, Regulations and Rules, 'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention'.

[865] Maritime International Nominees Establishment v Government of Guinea, para. 4.02. In this decision, it appears that the Convention excludes any attack on the award given by national courts.

an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.'[866] The awards should for this reason follow the enforcement provisions of the ICSID Convention.

As the wordings seems inspired by the ICSID Convention, it is important to clarify whether the permissible modifications of the ICSID Convention could lead to the agreements being sufficient to provide enforcement of an ICSID award under Articles 53 and 54 of the Convention.

Under general treaty law, the modifications made from ICSID in order to create the ICS can be considered as permissible modifications according to Article 41 VCLT, which provides for *inter se* modifications. However, the consequence hereto is that parties to the treaty that have not modified the ICSID Convention remain only bound by the original Convention, and do not need to accept any changes. This naturally means that they would not be under an obligation to enforce the modified awards under the ICSID Convention rules. This type of ICSID modification would not affect other ICSID contracting states. Since the ICS proceedings would not have to be enforced by the other contracting states, as the ICSID awards would put these other states in a disadvantaged position, it is important for this reason to see whether the awards can be regarded as arbitral awards susceptible of recognition and enforcement under the New York Convention.[867]

The purpose of the New York Convention is the enforcement of arbitral awards.[868] The fact that there is no real party autonomy in the ICS system may provide the awards given by the ICS, it come to be considered as judicial decisions rather than arbitral awards in accordance with Article I of the New York Convention.[869]

Arbitral awards which are defined as '(…) arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal',[870] are recognized and enforceable as foreign arbitral awards under the New York Convention.

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[866] Article 54(1)ICSID Convention, Regulations and Rules. The only practical obstacles to such enforcement measures are state immunity from execution rules as provided for in Article 55 of the Convention.

[867] United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1958] UNCITRAL The New York Convention.

[868] Ibid, Part 1, United Nations Conference on International Commercial Arbitration, New York, 20 May – 10 June 1958, Article I '(…) the purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards, and to consider other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes'.

[869] Ibid.

[870] Article I(1) ibid., 'It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'.

There is no requirement to be a member of the UNCITRAL in order to have UNCITRAL arbitration rules that apply to dispute settlement.[871] For this reason, arbitration proceedings against both, the EU and its Member States, may be conducted according to UNCITRAL rules.

The main issue would lie in whether national courts in the New York Convention contracting States will consider ICS awards as awards made by an arbitral body. The ICS seems to be more like a form of arbitration with judicial features.

In the CETA, TTIP, and the EU–Vietnam FTA (EUVFTA),[872] it is stated that the offer of consent by a Contracting Party together with its acceptance by an investor through the submission of a claim constituting an 'agreement in writing' for purposes of the New York Convention.[873] This is because the New York Convention requires 'an agreement in writing' for the purpose of recognition and enforcement under the Convention according to Article II.[874] Taking previous jurisprudence[875] into account, it would be very unlikely to believe that national courts would not accept this.

Furthermore, a reservation limiting the application of the New York Convention to 'commercial' disputes[876] should not impede the actual enforcement of investment awards,[877] because it has a broad definition of the notion 'commercial arbitration' which expressly also includes a reference to 'investment' according to the UNCITRAL Model Law on International Commercial Arbitration.[878]

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[871] European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (n 98), para. 33. Here can be noted that the European Parliament 'cannot use' the UNCITRAL arbitration rules since the EU 'as such' was not a member of '[this] organization' was misguided.

Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775), p. 560.

[872] EU-Vietnam Free Trade Agreement: Agreed text as of January 2016

[873] European Commission Textual proposal to the EU negotiaion of Transatlantic Trade and Investment Parternship (TTIP), Section 3, Article 7(2)(b), The consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of: … Article II of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards for an 'agreement in writing'; Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part Article 8.25(2)(b), EU-Vietnam Free Trade Agreement, Investment Chapter, Article 10(4)(b).

[874] United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article II (1) 'Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration'.

[875] An example of such earlier jurisprudence in this regard could be the Iran–US Claims Tribunal were some national courts initially had problems enforcing the tribunal's awards because of the lack of 'an agreement in writing' directly between the disputing parties, but was eventually accepted. Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. and others, US District Court (Central District of California), Decision of 14 January 1988, published in Albert J. van den Berg (ed.), Yearbook Commercial Arbitration, vol. XIV (1989), pp. 763, 765.

[876] United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article I(3) The New York Convention permits Contracting Parties to make a reservation to the effect that they apply the Convention 'only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration'.

[877] United Mexican States v Metalclad, Canada, Supreme Court of British Columbia, 2 May 2001 [2001] BCSC 664, 5 ICSID Reports 236, 247, para. 44; United Mexican States v Feldman Karpa, Canada, Ontario Court of Appeal, 11 January 2005, 9 ICSID Reports 508, 516, para. 41; Czech Republic v CME Czech Republic BV, Sweden, Svea Court of Appeal, 15 May 2003, 9 ICSID Reports 439, 493.

[878] UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (n 777).

The NGFTAs state that Each party 'shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party',[879] while '[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force, where such execution is sought.'[880]

In the EUVFTA, it is provided, according to Article 31(2), that each party shall recognize an award and enforce it in similar manners to when it is a final judgement in the party's State. It is the same rule as is provided in the ICSID convention Article 53 and cannot be overturned by domestic court decisions.

Both the EU-Singapore FTA (EUSFTA) and CETA refer directly to the enforcement provisions in the ICSID Convention or the New York Convention. The choice between the ICSID convention and the New York convention depends on the arbitration rules that are addressed.

All the three agreements seek to go beyond disputes in which investor-state arbitral awards qualify for enforcement under the New York Convention.[881] Furthermore, the CETA and EUVFTA take the same approach in regard to clarifying that a final award under the respective agreement shall qualify as an award under the ICSID Convention.

1.4.1 Competence Based Approach in Assessing the Conduct of the Parties

The issue of division of responsibility has already been discussed in the previous chapter. Here the different approach linked to the autonomy claim is clarified. Considering the adoption of this kind of rules in relation to the reports of the panel of the WTO, one can clearly see that there is a type of support linked to a more competence-based approach when assessing whether the conduct was to be attributed to the EU or the Member State.[882]

When the EU's acts are binding a Member State, the conduct of an organ of the Member State must in any case be attributed to that State. This is the view also taken by the European

[879] European Commission Textual proposal to the EU negotiaion of Transatlantic Trade and Investment Parternship (TTIP), section 3, Article 30(2), 'Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.'; EU-Vietnam Free Trade Agreement, Article 31(2), Investment chapter, section 3, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.28(9)(d) and Article 8.41.

[880] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 30(3), section 3, EU-Vietnam Free Trade Agreement, Investment Chapter, Section 3, Articles 8.28(9), (d), 8.41(4) and Article 31(5).

[881] Article 9.27 (4) EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Article 8.41 (5) Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, and Article 31 (7) EU-Vietnam Free Trade Agreement: Agreed text as of January 2016

[882] Pieter Jan Kuijper, 'Attribution - Responsibility - Remedy: Some Comments on the EU in Different International Regimes' (2013) 46 Belgian Review of International Law 57.

court of human rights.[883] It is furthermore reflected in the Draft Agreement on the accession of the EU to the European Convention on Human Rights Article 1, para. 4, which states that

> [f]or the purposes of the Convention, of the protocols thereto and of this Agreement, an act, measure or omission of organs of a Member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union.

It is made clear from this provision that the idea that the conduct of an organ of a Member State must be attributed exclusively to that state, irrespective of whether it was while implementing an EU act, or during an act in fields of exclusive competence of the EU.

The proposition of EU is that '(…) the purpose was to make explicit the attribution rule whereby acts of Member States are and remain only attributable to them even if they are acts of implementation of EU law'.[884] Consequently, the draft agreement makes it possible for the Member State to be held responsible, together with the EU. This could be the consequence of a violation of the European Convention on Human Rights that stems from an EU act, for example. The Member State shall not according to the draft agreement preclude the EU from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with Article 36, para. 4 of the Convention, and Article 3 of the Agreement.[885]

The EU representative clearly explained that Article 1, para. 4 of the draft agreement is '(...) based on the distinction between attribution of an act and the responsibility for the violation that may derive from it. The co-respondent accepts to take responsibility for an act which is not attributable to it (...)'.[886]

Moreover, the CJEU did not raise any objection to the way in which the draft agreement addressed the question of the attribution of conduct amounting to a breach of the European Convention on Human Rights in Opinion 2/13. The Court only commented that question of apportionment of responsibility between the EU and its Member States, in such regard, must

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[883] For the relevant case law see the ILC's commentary to Article 64 of the ARIO, UN United Nations, 'Report of the International Law Commission, 63rd Session' (2011) A/66/1081 <http://legal.un.org/ilc/sessions/63/> accessed 16 April 2018., pp. 168-169.

[884] Council of Europe Ministers' Deputies 'Information Documents, Second Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights' 2012 <https://rm.coe.int/16805c9abd> accessed 17 April 2018.

[885] Article 1, para. 4, United Nations Draft articles on the responsibility of international organizations [2011] International Law Commission A/66/10, para. 87.

[886] Council of Europe Ministers' Deputies 'Information Documents, Second Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights' (n 884).

be resolved solely '(...) in accordance with the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission'.[887]

The ITLOS opinion gave relevance to the allocation of competence by stating that '(…) the liability of an international organization for an internationally wrongful act is linked to its competence'.[888] However, this statement cannot be taken out of context. According to this mechanism,[889] it is the party, in this sense the organization or the Member State, which has competence that must bear responsibility for the breach of the Convention. When concluding an agreement on matters falling within its competence, ITLOS concluded that it may accept obligations which also cover the conduct of the Member States. It does not appear that a Member State's conduct would be attributed to the organisation. It observed that:

> (…) in cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its Member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization.[890]

In this regard, if an organisation would accept an obligation under which the Member State will pursue a certain conduct, and the Member State would fail in its actions, it would be clear that the organisation would be held responsible. Even though this is the case, it cannot lead to a direct and automatic conclusion that the conduct of the Member State would be attributed to the organisation. However, it is the conduct itself that triggers the responsibility. In this sense, it is clear that it is not possible to rely on the existence of a special rule for the issue of attribution of competence and responsibility between the EU and its Member States. It is not possible to find confirmation for such rule in international practice, since there is no consistency in these issues. In the European Convention of Human Rights, it seems that the conduct of an organ of a Member State must be attributed to that state, even if this conduct is aimed at implementing EU law. However, in the context of the WTO, the WTO panels appear to accept the view that the conduct of Member States, in implementing EU acts, must be

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[887] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), paras. 230 and 234.

[888] Advisory Opinion, 2 April 2015, 'Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) International Tribunal for the Law of the Seas(n), para. 168.

[889] Council Decision (EU) 2016/455 of 22 March 2016 authorising the opening of negotiations on behalf of the European Union on the elements of a draft text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction [1982] OJ L 79/32, The special mechanism is established under Annex IX.

[890] Ibid, p. 172.

attributed to the EU.[891] This is namely because of the importance the EU exclusive competence has shown to play in the context of the WTO and for third States.

1.4.2 The NGFTAs Solving Previous Issues of Responsibility

A dispute settlement mechanism, such as the one in CETA, allows an investor to bring a claim against the EU or a Member State for a breach of its obligation under the treaty.[892] It is possible that this mechanism will be considered as a model for future trade agreements. In investment arbitration, the question of responsibility is too wide, since it is a question that will be raised in all cases. In this regard, the procedure of bringing an investment claim becomes important to consider, since it can give clear indication as to whether it is the EU or the Member State which will be held responsible in the allocation of responsibility.

Chapter 2 of the EUSFTA confers dispute settlement on alleged breach of investment protection, which causes loss or damage to the claimant or established company.[893]

In the EPA, the dispute settlement concerns the interpretation and application of the provisions of the agreement.[894] And in the EUVFTA, the dispute settlement relates as well to the interpretation or application of the provisions of the agreement, and if it is in breach, the link between the breach and the inconsistency must be shown. However, there is no indication for the loss or damage as in the EUSFTA.[895]

In the CETA, if the investor intends to initiate arbitration proceedings, '(…) the investor shall deliver to the European Union a notice requesting a determination of the respondent'.[896] Thereafter, the EU must inform the investor as to whether the EU or the Member State will act as respondent to the case. In the event that the EU does not reply within 50 days on who will act as a respondent, the investor may choose one. It is established this way in order to avoid the risk of external interference in the division of responsibility between the EU and its Member State.

The CETA provisions in relation to the section process of the respondents clearly states that '[t]he European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the

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[891] Kuijper, 'Attribution - Responsibility - Remedy: Some Comments on the EU in Different International Regimes' (n 882), Kuijper provides different factors that may explain these different legal regimes.

[892] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Section F of Chapter 8.

[893] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Chapter 3, Article 3.1.

[894] Agreement between the European Union and Japan for an Economic Partnership, Article 21.2. Unless otherwise provided for in this Agreement, this Chapter applies with respect to the settlement of any dispute between the Parties, concerning the interpretation and application of the provisions of this Agreement.

[895] EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018), Chapter 14 on Dispute settlement, Section 1, Article 2.

[896] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

respondent'.[897] This amounts to that it is not upon the parties concerned to decide about the respondent, but in fact, it is a determination which should be done by the EU. The way the EU determines such issues will clearly be executed following a competence-based approach. Conveniently, for the EU, it seems to meet the concern about the risks in relation to the allocation of international responsibility between the EU and its Member State. The conclusion is simply that the mechanism in the CETA is not put there as a coincidence, but as a new more general trend for this type of trade agreements.[898]

When determining responsibility in these types of agreements, the issues in relation to the EU's autonomy is if the agreement would provide for provisions which may define directly or indirectly, the internal competences within the EU. If this was the case, it could amount to a breach in relation to the EU's autonomy. In the CETA, the EU can choose the respondent; however, the criteria on how such determination should be done is not specified in the agreement, which leave the EU the discretion to decide on its own distribution of competences.

Since the agreements do not include how the EU deals with the allocation of competences between itself and its Member States, the same naturally goes for their obligations. This leads to that in a case where there is no clear partition between the EU and its Member State, both would bear the responsibility in a case of breach.[899]

If an external arbitration tribunal would interfere, when assessing the question of responsibility may as well result in that the external arbitration tribunal interferes in the internal division of competence, which would result in breaching the EU autonomy. This result in a clear issue with It was clearly stated by the CJEU in Opinion 2/13 that

> (…) a decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission.[900]

The EU is the only party who is recognized with power in the first stage of investor dispute settlement in relation to determine the respondent. This leads to avoiding the risk of external interference.

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[897] Ibid, Article 8.21.3.

[898] Pieter Jan Kuijper and Esa Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union - European and International Perspectives* (Hart Publishing 2013). Here are the EU's advantages highlighted.

[899] Christian Tomuschat, 'The International Responsibility of the European Union' in Enzo Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer 2002), p. 185.

[900] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 230.

1.4.3 Judicial Review of Investment Awards

If such agreement would be concluded within exclusive competence, it means that in relation to an investor state arbitration, the EU and not individual Member States would function as the respondent.[901]

In circumstances where an FTA would be concluded as a mixed agreement, it would also be possible that the Member States act as respondents. However, this only applies for certain demands as provided in Article 2(1) TFEU. The EU would in these circumstances act as respondent in exclusive matters. If, nevertheless, an investment tribunal was to carry out such an assessment, it would lead to engaging in interpreting primary EU law, since the respondents' status is governed by the principle of sincere cooperation,[902] and the financial responsibility is, in this regard, seen as an expression of that principle.[903] It is not only the Member States that can act as respondents to investment disputes, the Regulation also provides that the European Commission has substantial powers to assume the respondent status, following a '(…) full and balanced factual analysis and legal reasoning.'[904] The regulation follows internal allocation of competence.[905] The Commission, however, remains the authority to intervene in cases where the EU's interests are at stake, even when the disputed treatment is afforded by the Member State.[906]

In this regard, the regulation gives the power to the Commission to intervene and serve as a gateway to a single-respondent system. It differs from the EU's representation in the WTO dispute settlement body.[907] In terms of arbitration, the regulation would not be applicable; the investor state tribunal would therefore look at these investment agreements only for guidance.

Essentially, investment disputes, which are brought by a Member State against a third country, would not include the assessment of an EU legal act. This is however not always the case. In the *MOX Plant* case,[908] Ireland considered that the UK had failed in its obligation under United Nations Convention on the Law of the Sea (UNCLOS) in relation to protecting the

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[901] Regulation 912/2014 Establishing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals (n 714).

[902] Article 4(3) TEU.

[903] Regulation 912/2014 Establishing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals (n 714).

[904] 'European Parliament and the Council, establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party' (n 742), Article 9.

[905] Ibid, Article 1.

[906] Kleinheisterkamp, 'Financial Responsibility in European International Investment Policy' (n 733).

[907] Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775); European Commission, Communication Towards a Comprehensive European International Investment Policy, (n 53), p. 568; Stijn Billiet, 'From GATT to the WTO: The Internal Struggle for External Competences in the EU' (2006) 44 Journal of Common Market Studies 899.

[908] C-459/03, Commission v Ireland (n 625).

marine environment, and therefore initiated proceedings in the International Arbitral Tribunal.[909] The Commission considered the dispute to involve interpretation of the Treaty, and therefore, instituted infringement proceedings against Ireland on the basis of Article 344 TFEU. The CJEU ruled that Article 344 TFEU was applicable, and that the arbitration was considering matters, which concerned the interpretation and application of the Treaty.[910]

This result is a restricted situation for the Member States. In fact, it clearly limits the Member States' competence to settle disputes concerning the interpretation and application of the Treaties through arbitration. In the case of threat, the FTAs should be concluded within exclusive competence; Article 344 TFEU does not limit the EU's competence. Furthermore, the EU Treaties do not regulate the way under which dispute settlements should be carried out for FTAs and investor-state arbitration. For the abovementioned reasons, Article 344 can be considered as a clear limit to the investment arbitration, and therefore, there should be no reason not to include investor-state arbitration in international investment agreements.[911]

2 ICS in NGFTAs in Relation to EU Autonomy

The principle of autonomy was developed through CJEU jurisprudence. Primarily, autonomy was used to refer to the internal threat to the EU in relation to its Member States; '(…) the EC Treaty has the character of an autonomous constitution and, as a result, it constitutes the exclusive source of Community law.'[912] Similarly, in the *Costa* case, the CJEU made a strong link between the principles of autonomy and the EU through stating that it is '(...) an independent source of law' that '(…) cannot be overridden by domestic legal provisions'.[913] This was further developed over time, where the internal autonomy led to protection of the external dimension of autonomy.

There has become a new emerged threat for the application of EU law, with the ever-growing range of international tribunals outside the domestic legal order of any particular State. Such threat stems from the arbitral tribunal established in NGFTAs. The first discussions for the negotiations were meant to establish similar systems to the ones existing in BITs. However, even though they operate completely outside the EU's institutional system, they can decide

[909] The UK's decision to authorize the construction and operation of a plant to make mixed oxide fuel (Mox) gave rise to multiple proceedings instituted by Ireland against the United Kingdom under the 'ospar Convention' (Convention for the Protection of the Marine Environment of the North-East Atlantic).

[910] C-459/03, Commission v Ireland (n 625), paras. 125-127.

[911] Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775), p. 562.

[912] Barents, *The Autonomy of Community Law* (n 33), p. 112.

[913] C-6/64, Costa v. E.N.E.L. (n 28), p. 594.

upon the interpretation or applicability of EU law. It was also discussed in relation to investment tribunals, such as the question on whether the interpretation of an investment tribunal in the ICSID would in fact undermine the uniformity of the EU legal order.[914]

Issues of EU law have been also raised before other kinds of external court systems, such as the International Court of Justice, the European Court of Human Rights, and the World Trade Organisation Dispute Settlement Body. There have also been issues taken up in relation to the International Labour Organisation (ILO) administrative tribunal.

The danger of such application or interpretation of EU law would be to affect the uniform application of the EU law, namely because these tribunals cannot make a preliminary reference to the CJEU, because they are not considered as 'courts of Member States' (uniform application).

Moreover, it raises issues because the error in applying or interpreting EU law cannot be corrected, or even be attributed to any individual Member State; and for this reason, also the Commission cannot bring an infringement proceeding against them (responsibility).

2.1 ISDS in Relation to EU's Competence

The changes stemming from the Lisbon Treaty provided a shift in the allocation of competence, in relation to foreign direct investment, from the Member States to the EU.[915] The attribution of competence becomes an important question in this regard. If compared with traditional BITs, where there is a control that the contracting party cannot bring up the claim in front of investment tribunals of which the investor is not a national, in an EU multi-layered system, it is different since the allocation of the respondent status requires an assessment of the attribution of competences between the Member States and the EU.[916]

The decision to include ISDS in the NGFTA is very controversial. The arguments used against the inclusion of ISDS are basically that it would undermine the regulatory autonomy and the democratic process. This is because when a private actor brings a claim against a regulatory initiative, it could have an effect of adversely impacting their economic interests, and in this way, it could in consequence be a treat to litigation, which in turn could prevent the policy makers to a certain extent.

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914 ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary

915 Article 207(1) TFEU "The Common Commercial Policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, […]".

916 Steffen Hindelang, 'The Autonomy of the European Legal Order' in Marc Bungenberg and Christoph Herrmann (eds), *European Yearbook of International Economic Law Special Issue: Common Commercial Policy after Lisbon* (Springer 2013), p. 196.

The lawyers and arbitrators involved in the ISDS play an important role in the interpretation of the Treaties.[917] Naturally, in certain situations, arbitral awards have been made in favour of the open market, and the role of the State has been reduced.[918] Consequently, there is a need for a changed system where more transparency of arbitral proceedings should be introduced so that the states can reclaim ownership of international investment law, and lead to less impartiality of arbitrators and inconsistency of arbitral awards. This is, naturally, more relevant in agreements concluded with developed countries, where there is a high level of investment protection, because it could lead to that foreign investors bypass domestic courts and submit claims directly before an ad hoc arbitration tribunal. In the NGFTAs, the EU maintains ISDS, but makes a few changes. The reform proposal by the EU has led to enhancing transparency and limiting investor access to ISDS through the definition of investor.

The EU considered that the ISDS mechanisms should be improved[919] in areas concerning transparency in order to increase legitimacy and accountability of proceedings, making all documents publicly available.[920] The EU also considers that improvement should be made in setting out rules of conduct in order to ensure that the arbitrators are independent and impartial.[921] Furthermore, the EU is working to promote a better consistency when interpreting the investment provisions, where the parties should issue binding interpretations on the issues of law resulting from the agreements. The establishment of an appellant mechanism at the bilateral and multilateral levels[922] has also been discussed, for example, in relation to the CETA,[923] in order to provide a body for a more consistent interpretation of international investment law.[924]

2.1.1 ISDS within Shared Competence

The CJEU concluded that ISDS should be within shared competence, simply because the system in itself would in a way remove disputes from the national jurisdiction of the Courts of the Member State and would in this way threaten the sovereignty of the Member State.[925]

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[917] Muthucumuraswamy Sornarajah, 'Evolution or revolution in International Investment Arbitration? The Descent into Normlessness ' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011), p. 633.

[918] Ibid.

[919] European Commission Staff Working Report 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) ' 2015 <trade.ec.europa.eu/consultations/index.cfm?consul_id=179> accessed 17 March 2018, p. 10.

[920] Ibid, p. 10.

[921] Ibid, p. 10.

[922] Ibid, p. 10.

[923] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[924] Gilbert Gagne and Jean-Frederic Morin, 'The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model Bit' (2006) 9 Journal of International Economic Law 357, p. 378.

[925] 2/15, AG Sharpston Opinion in Opinion of Singapore FTA (n 269), para. 292.

Since the CJEU did not in fact consider the ISDS, one can perhaps draw the conclusion that the CJEU considers it to be compatible with the Treaties.[926] If instead, the CJEU believed otherwise, it could have simply stopped the proceeding with the statement that it is incompatible to the Treaty and decided not to further examine the competence. In this case, the question posed was clearly on the competence, and not on the compatibility. The Advocate General even stated that

> (…) this opinion of the Court relates only to the nature of the competence of the European union to sign and conclude the envisaged agreement. It is entirely without prejudice to the question whether the content of the agreement's provisions is compatible with EU law.[927]

There is common line of rejection around many judges and German association of judges, who have objected the ICS. One can consider that this may be mainly because of that the Member State's courts play an important role as the 'guardians' of the EU legal order. In fact, it is the Member State's key role to care for a uniform application and interpretation of EU law through the mechanism of preliminary ruling procedure.[928]
Even in relation to the Intra-EU bilateral investment Treaties, the ISDS is a great concern for the Commission. The legal service even contested the jurisdiction of the investment tribunals. In the *Achmea* case which concerned the incompatibility of intra-EU investment bilateral investment treaties the within the EU legal order.[929]

The system of investment dispute resolution in the *Achmea* case served as a preferential alternative to the EU judicial system under Articles 19 TEU and 267 TFEU. Such inter-state system directed at foreign investment could in fact jeopardize the uniform and consistent application of the EU law within the internal market. The *Achmea* case produced a stop to such intra-EU BITs activity.

The question has naturally occurred, whether the investment chapter in the CETA could amount to similar conclusions. In this case, the CJEU rejected that an arbitral tribunal established under an international agreement between two Member States could be considered part of the judicial system of the EU.[930] The precise question to pose is whether the outcome of a case, which concerned a bilateral treaty between two Member States as contracting parties, can be applicable as well in relation to international investment Treaties and third

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[926] Ibid, para. 30, further related in paras. 290-293.

[927] Ibid, para. 30, paras. 290-293.

[928] Roberto Baratta, 'National Courts as Guardians and Ordinary Courts of EU Law: Opinion 1/09 of the ECJ ' (2011) 38 Legal Issues of Economic Integration 297, Baratte views this for the perspective of protecting the EU's autonomy, p. 297.

[929] The *Achmea* case concerned investor-dispute-settlement (ISDS) mechanism in the bilateral investment treaty between the Netherland and Slovakia. This bilateral treaty by the two EU Member States was found to be incompatible with EU law.

[930] Judgment of the Court of Justice of 6 March 2018, *Slowakische Republik v Achmea BV*, C-284/16, ECLI:EU:C:2018:158, para. 45.

parties. It is important to at least highlight that there is a possibility that the CJEU may confirm the reasoning in its pending Opinion 1/17.[931]

In this case, the Commission expressed its concern in relation to the question of compatibility. It states:

> There are some provisions of the Dutch-Slovak BIT that raise fundamental questions regarding compatibility with EU law. Most prominent among these are the provisions of the BIT providing for an investor-state arbitral mechanism (set out in Article. 8), and the provisions of the BIT providing for an inter-state arbitral mechanism (set out in Article. 10). These provisions conflict with EU law on the exclusive competence of the EU court for claims which involve EU law, even for claims where EU law would only partially be affected. The European Commission must therefore (…) express its reservation with respect to the Arbitral Tribunal's competence to arbitrate the claim brought before it by Eureko B.V. (See para. 193 of the Award).[932]

When discussing the possible implication stemming from the *Achmea* judgment, it is important to first of all address that the ICS as provided in the CETA, and the ISDS in *Achmea* are not in fact the same, and therefore, cannot be directly compared. However, by closely considering the differences and similarities, it could be possible to make a fair comparison.

The ICS, as was thoroughly explained earlier, is a modernized system of the ISDS. By improving the internal coherence of investment law and the independence of arbitrators, as well as reducing the private autonomy system within the selection process, the ICS meets higher rule of law standards.

However, the reason behind the ISDS being declared incompatible with *Achmea* was because the CJEU stated that the autonomy was infringed in the *Achmea* judgment; such statement was justified by the fact that what constitutes the EU legal order is the 'essential characteristics of the EU and its law'.[933]

The CJEU added that the Article 8 of the BIT between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic

> (…) is such as to call into question not only the principle of mutual trust between [EU] member states but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation.[934]

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[931] 1/17, Opinion on the Agreement EU-Canada (n 672).

[932] C-284/16, Achmea (n 930).

[933] Ibid, para. 33.

[934] Ibid, para. 58.

However, this case surrounds a BIT, where the establishment of the arbitral tribunal was accomplished by the Member States. This can be considered as a different situation in relation to the NGFTAs, simply because the BITs are essentially different from commercial arbitration proceedings. The BIT tribunal derives from a treaty through which the Member States agree to remove the jurisdiction of their own courts. This means that they also remove the jurisdiction from the system of judicial remedies. However, the second subparagraph of Article 19(1) TEU requires them to provide sufficient remedies to ensure effective legal protection in the fields covered by EU law.[935] The NGFTAs which constitute investment arbitration is fundamentally different. Investment arbitration

> (…) derive[s] from a treaty by which [EU] member states agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which [EU law] requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law.[936]

The autonomy of the EU legal order could only be preserved by a functional judicial system that is capable to ensure consistence interpretation of EU law.[937] If one were to remove disputes from the CJEU, to adjudicate them in arbitrational courts, the whole idea of a functional judicial system is lost, and so the idea of preliminary ruling procedures.[938] The arbitration mechanism was considered by the CJEU to interpret EU law, because of its objection that Article 8 of the BIT was incompatible with EU law.[939] If, however, an arbitral tribunal would have to prevent interpretative decisions of EU law, there would be no concern. This was done in the NGFTAs by excluding that the CJEU is bound by the tribunal's interpretations.[940] These are fundamental concerns which apply to NGFTAs, which will be shown in the CJEU's pending case Opinion 1/17.

2.1.2 ISDS Provisions not in Conflict with Article 344 TFEU

In relation to dispute settlement between a state and an investor, Advocate General Wathelet answered that such procedure would not come within the scope of Article 344 TFEU. He made an analogy to Opinion 2/13, where the CJEU found the terms of accession to be incompatible with EU law; meaning that the disputes arising in this case were solely between

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935 Judgment of the Court of Justice of 27 February 2018, *Associação Sindical dos Juízes Portugueses* C-64/16, ECLI:EU:C:2018:117, para. 34.

936 C-284/16, Achmea (n 930), para 55.

937 Ibid, para. 35.

938 Ibid, paras. 50-52.

939 Ibid, paras. 68-72.

940 Article 8.31 European Commision 'CETA – Summary of the Final Negotiating Results' 2016 doc 152982 <http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf> accessed 26 March 2017; nearly identical: Section 3, Article 16(2) EU-Vietnam Free Trade Agreement: Agreed text as of January 2016

the Member States themselves, or between the Member States and the EU.[941] AG Wathelet therefore meant that the situation with disputes between individuals and States would lead to a different outcome, i.e., not in contrary to Article 344 TFEU.[942]

Article 344 TFEU was interpreted in the *MOX Plant* case as limiting the possibilities for the Member States to settle their disputes outside its jurisdiction.[943] This reasoning has been considered by the majority not to be transposable to ISDS proceedings.[944] Such reasoning was considered when the ISDS proceedings would include two EU Member States as parties. This reasoning has its roots in the fact that Article 344 TFEU prohibits a Member State from submitting to an investment tribunal '(…) any dispute with another Member State involving questions relating to the interpretation or application of the [t]reaties'. The provision is clearly referring to inter-state dispute and does not mention anything in regard to legal conflicts between Member States and private individuals, and thus, it cannot be regarded as binding private individuals. Since the ISDS mechanism is considered to be outside the scope of the CCP, one can conclude that the incorporation of the ISDS mechanism would not in itself violate Article 344 TFEU.[945]

Moreover, considering the Treaty from a more general perspective, there is no such provision providing the CJEU with exclusive competence to adjudicate dispute between the Member State and individuals.[946] Consequently, it could be considered very unlikely for the CJEU to consider the ISDS to be incompatible with EU law.

Article 344 TFEU restrains only the competence of the Member States, and not the competence of the EU, in settling disputes outside the EU legal order. Therefore, if such agreements were to be concluded within EU exclusive competence, Article 344 TFEU should definitely not apply because of the absence of the Member States' involvement.

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[941] The CJEU considered this despite of the fact that the CJEU being aware that most disputes brought before the European Court of Human Rights were disputes between individuals and States.

[942] C-284/16, Achmea (n 930), paras. 151-152.

[943] C-459/03, Commission v Ireland (n 625).

[944] Eilmansberger, 'Bilateral Investment Treaties and EU Law' (n 368), p. 404; Angelos Dimopoulos, 'The Validity and Applicability of International Investment Agreements between EU Member States Under EU and International Law' (2011) 48 Common Market Law Review 63, p. 404; August Reinisch, 'The EU on the Investment Path - quo vadis Europe? The Future of the EU BITs and other Investment Agreements.' (2014) 12 Santa Clara Journal of International Law 111, p. 177; Stephan W Schill, 'Luxembourg Limits: Conditions For Investor-State Dispute Settlement Under Future EU Investment Agreements' (2013) 2/2013 Transnational Dispute Management <www.transnational-dispute-management.com> accessed 8 March 2018.p. 42; Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775), p. 592; Konstanze von Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide Between Investment Tribunals and The ECJ? A Plea for Direct Referral From Investment Tribunals to the ECJ' (2013) 50 Common Market Law Review, p. 1054.

[945] Dimopoulos, 'The Validity and Applicability of International Investment Agreements between EU Member States Under EU and International Law' (n 944), pp. 86–87; von Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide Between Investment Tribunals and The ECJ? A Plea for Direct Referral From Investment Tribunals to the ECJ', (n 944), p. 1054.

[946] Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775), p. 562; Eilmansberger, 'Bilateral Investment Treaties and EU Law' (n 368), p. 404.

If on the other hand, such agreements are concluded as mixed, where the Member States would have an active role, it may in fact amount to that an ISDS mechanism would constitute a violation of Article 344 TFEU.

Keeping in mind the opinion made by the CJEU in relation to the European patent court, it was clear that Article 344 TFEU does not prevent Member States from creating a court for settling disputes between private parties. However, based on this, one cannot draw the direct conclusion that the same provision does not apply between a state and a private party.[947] For this reason, it cannot be certain that an ISDS mechanism would not constitute a violation in relation to Article 344 TFEU.

On the other hand, some scholars are convinced that the application of the *MOX Plant* case should apply by analogy to the ISDS. There '(…) is no certainty regarding the question of whether the reach of Article 344 TFEU is limited to disputes between Member States '(…) and could not include disputes between a Member State and an investor.[948] The analogue application of Article 344 to investor-state disputes would be presented in the context of intra-EU BITs. This would be by drawing up the investor-state dispute as a dispute between two states. This would be accomplished by arguing that it can be considered as a dispute between the individual investor's home Member State and a host Member State. This is because the individual from the home state bringing the claim against the host state would desire to enforce obligation between the host state and its home state.[949] In this regard, the individual approached could be considered transferable to the home State. The consequence here would be to provide the ISDS mechanism '(…) in an intra-EU BIT can, to the extent EU law is the subject of the dispute, also conflict with Article 344 of the TFEU'.[950] However, since Article 344 TFEU applies to disputes between Member States, this situation is possible in relation to inter-EU disputes. If one were to consider a Member State and a third state, Article 344 should not apply, and consequently, in this regard, the *MOX Plant* case would not be transposable to ISDS.

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947 Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775), p. 562, Eilmansberger, 'Bilateral Investment Treaties and EU Law', (n 368), p. 404.

948 von Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide Between Investment Tribunals and The ECJ? A Plea for Direct Referral From Investment Tribunals to the ECJ', (n 944), p. 1054.

949 Steffen Hindelang, 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39 Legal Issues of Economic Integration 179, p. 200; Steffen Hindelang, 'Member State BITs - There's Still (Some) Life in the Old Dog, Incompatibility of Existing Member State BITs with EU Law and Possible Remedies' in Karl Sauvant (ed), *Yearbook on International Investment Law & Policy 2010-2011* (Oxford University Press 2012), pp. 230-231.

950 Hindelang, 'Member State BITs - There's Still (Some) Life in the Old Dog, Incompatibility of Existing Member State BITs with EU Law and Possible Remedies' (n 949), p. 230.

2.2 Protecting the EU Autonomy

An international agreement such as the NGFTAs may not affect the power of the CJEU, if it can be shown that the system in place does not provide an adverse effect on the autonomy of the EU legal order.[951]

To preserve the autonomy, it is necessary that there is a procedure ensuring uniform interpretation of the rules of international agreements. However, when resolving disputes, it must not have the effect of binding the EU and its institutions to a particular interpretation of EU law, where such interpretation would apply in their exercise of internal powers in the EU.[952] Concluded international agreements become integral parts of the EU legal order according to Article 216(2) TFEU.[953] International agreements are subordinated to the Treaty, but are considered to be higher in rank than the secondary EU law according to hierarchy of EU norms.[954]

In this regard, decisions and interpretations of international courts and tribunals would affect secondary EU law to the same extent as the international agreement in question.[955] However, such interpretation could not affect the interpretation of primary EU law.[956]

For example, a decision by such international judicial body, which enters the EU legal order at the same level as the agreement, would require a consistent interpretation of secondary EU law, but not of the Treaties.[957]

The European Court of Justice is the guardian for making sure that the principle of conferral is respected through the action for annulment or the preliminary ruling concerning the validity of the acts of the institutions.

In the *Van Gend en Loos* judgment, the CJEU declared that Member States '(...) have limited their sovereign rights, albeit within limits fields'. This relates to establishing the

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951 1/00, Opinion Establishing a European Common Aviation Area (n 785), paras. 21, 23 and 26; 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 183.

952 1/91, Opinion on European Economic Area EEA Agreement I (n 447), para. 30-35; 1/00, Opinion Establishing a European Common Aviation Area (n 785), para. 13; 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 184.

953 Judgment of the Court of Justice of 30 April 1974, *R. & V. Haegeman v Belgian State*, C-181/73, ECLI:EU:C:1974:41, para. 5 (1974); Judgment of the Court of Justice of 21 December 2011, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, C-366/10, ECLI:EU:C:2011:864, para. 50 (2011).

954 C-61/94, Commission v Germany (n 800), para. 52; C-286/02 Bellio (n 800), para. 33. C-344/04, IATA and ELFAA (n 625), para. 35; Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (n 626), p. 1310.

955 Judgment of the Court of Justice of 20 September 1990, *Sevince v Staatssecretaris van Justitie*, C-192/89, ECLI:EU:C:1990:322, paras. 8-9, the decisions taken by the 'Council of Association' was equal to a legal act because of its close link to the implementation of the Ankara Agreement.

956 Kirsten Schmalenbach, 'Struggle for Exclusiveness: The ECJ and Competing International Tribunals' in Isabelle Buffard and others (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008) pp. 1048–1049 ; Barbara Brandtner, 'Drama of the EEA Comments on Opinions 1/91 and 1/92' (1992) 3 European Journal of International Law 300, pp. 309-310.

957 Schmalenbach, 'Struggle for Exclusiveness: The ECJ and Competing International Tribunals'(n 956), pp. 1048-1049.

character of the former European Community as a new legal order of international law on the basis of autonomy, and the principles of primacy and direct effect.

2.2.1 External Interference with the Internal Division of Powers

The EU's main concern in relation to the question of the allocation of international responsibility between the EU and the Member State appears to be the potential external interference in the EU's internal division of powers. The CJEU emphasised its concern in relation to the EU's accession to the European Convention on Human Rights, where the Court permitted the Court of Human Rights to decide on the question of responsibility; in other words, to decide on whether the EU or its Member States were considered responsible for an act or omission that violated the European Convention on human rights. The CJEU decided that this would amount to '(…) adversely affecting the division of powers between the EU and its Member States'.

The Energy Charter is another example where the division of responsibility was at question. The Energy Charter together with the statement by the EU at the time of its ratification, simply provided that the investor needs to seek clarification from the EU on whom to challenge. An international investment treaty, which has been concluded as a mixed agreement, could not just simply eliminate the potential of risk in interference in the division of responsibility. In the Energy Charter, the investor is further given the possibility to initiate the proceedings against both the EU and its Member States. In this regard, by deciding over who must bear the responsibility between the EU and its Member State, there may be a risk that the investment tribunal is in fact interfering with the internal division of powers between the EU and its Member State.

In relation to the CETA, where the provision has left it to the EU to take a decision as to who will act as the respondent, it appears that such a risk is greatly weakened. Leaving the EU to make such a decision would consequently permit it to foster a competence-based approach to the problem of allocating international responsibility. In other words, this would lead to that in cases in which the contested measures were taken by the Member States for the purpose of implementing EU acts, the EU has to accept bearing the responsibility. However, it seems that there is no possibility under the CETA to have a joint or several responsibilities of the EU and its Member States.

2.2.2 Powers of EU Institutions

In relation to the EU accommodating to it international commitments there is still the need to attempts to conceptualize the position of the CJEU's superiors character on deciding on EU law issues in relation to the Member State domestic court system through a theoretical

concept of constitutionalism.[958] It has, however been criticized, and some researchers mean that the focus should instead be put on the foundations of the institutional aspect of the autonomy of the EU.[959]

The essential character of the powers of the EU and its institutions would not be possible to change through an international agreement.[960] It remains the Court's exclusive task to review the legality of the acts of the EU's institution, which is why the agreement or interpretation made of the agreement may not interfere with such task. [961] It is in particular relevant in relation to when an agreement would confer powers on the Court or the Commission, in relation to contracting parties, which are not the EU Member States.[962]

In this regard, it would be considered 'unacceptable' that such court would deliver preliminary rulings, which are '(…) purely advisory and without any binding effects.' Mainly because this would '(…) change the nature of the function of the Court of Justice as it is conceived by the Treaty'.[963]

The CETA tribunal established in the agreement has as a function to assess the compatibility between the provisions laid down in the investment agreements, and the legal acts of the EU and its Member States. According to Article 8.41, the awards given by the tribunal shall be binding on the parties to the dispute. The EU is bound by the international agreement it has concluded according to Article 216(2) TFEU.[964] Since international commitments prevail over EU secondary law, it naturally means that a decision taken by the tribunal would have to be implemented by the EU even though it would be contrary to EU secondary law. This could in turn alter the essential character of the powers of the EU's institutions. To confer power on an international body to assess whether the EU has respected its commitments under an international agreement is not in itself contrary to EU law. For example, there are external bodies which do not form part of the EU.[965] Examples hereto is the Court of Justice of the European Free Trade Association States which is more commonly known as the EFTA Court (EFTAct) and the EPCt.[966] Another example that is more directly applicable to the ICS is the

[958] Joseph Weiler and Ulrich Haltern, 'The Autonomy of the Community Legal Order - Through the Looking Glass' (1996) 37 Harvard International Law Journal 411.

[959] Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (n 34).

[960] 1/00, Opinion Establishing a European Common Aviation Area (n 785), para. 12.

[961] Ibid, para. 24.

[962] Ibid, paras. 18-21.

[963] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), para. 61; Opinion of the Court of Justice of 10 April 1992, *(European Economic Area, EEA Agreement II)*, 1/92, EU:C:1992:189, para. 32; 1/00, Opinion Establishing a European Common Aviation Area (n 785), para. 25.

[964] Article 216(2) TFEU Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

[965] Angelos Dimopoulos, 'The involvement of the EU in Investor-State Dispute Settlement: A question of Responsibilities' (2014) 51 Common Market Law Review 1671, p. 1698. Note here that it is not possible to make a direct comparison.

[966] Ibid, p. 1698. Note here that it is not possible to make a direct comparison.

WTO dispute settlement body. The EU is a member of the WTO, and is therefore required to respect its commitments, which include respecting the decisions taken by the dispute settlement body. Looking at this from a more general perspective, it is possible to see that such mechanism would in fact infringe the institutional principle or even lead to an alteration of the powers of the EU's institutions.

The CETA tribunal would operate in a comparable manner. It would, in a similar way to the dispute settlement body, also assess the compatibility of EU acts in light of the relevant international agreement. In the WTO dispute settlement mechanism, the EU may even in certain situations be under the obligation to modify its law to accommodate to a third country.

The CETA would not have direct effect.[967] If one were to consider an international review of the EU's action, such as the one in the WTO, as incompatible with the EU Treaties, it would mean that the EU could not agree to participate in any dispute resolution mechanism in its international relation, which in turn would leave the EU outside the global trading system.

However, it can still be questioned whether the investment protection mechanism would affect the legislative and regulatory powers of the EU's institution and Member States.

The jurisdiction of the CETA tribunal is only competent to decide whether there has been a breach of the provisions of section C concerning non-discrimination, and section D concerning in particular FET, and the prohibition of expropriation according to Article 8.18 CETA.[968] Moreover, the Tribunal may only award monetary damages, as provided in Article 8.39.[969] The EU or its Member States would be able to maintain any measure even though the tribunal considers it contrary to the investment protection principles in the agreement. The award would only be binding in the case at hand, and therefore, would not have *erga omnes* effects.[970]

It could, nevertheless, be argued that because of the financial award, the EU legislature and regulatory authorities might consider themselves constrained, and therefore accommodate to the decisions taken by the tribunal anyway. However, this would presuppose that the competent institution itself decides not to regulate due to the fear of a financial award, even though this cannot be considered as a formal interference between the division of competence of EU's institutions. From this argumentation, it would not be possible to deduct that the investment protection would be incompatible with EU law. However, the financial award could

[967] The general rule applying for the WTO agreement is that it is not directly effective with certain exception for the area of antidumping.

[968] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[969] Ibid.

[970] In this regard, the cases will be judged at hand, and there will be not in theory produce jurisprudence which would apply to all.

lead to pursuing legitimate policy objectives in line with domestic law, which in turn may affect the powers of EU's institutions.

As provided in Article 8.9 of CETA,[971] the right to regulate in order to achieve legitimate policy objectives, and '(…) the mere fact that a Party regulates (…) in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits does not amount to a breach of an obligation'.

The Investment Chapter in the CETA imposes high thresholds for establishing the violation: Article 8.10[972] on fair and equitable treatment ('fundamental breach of due process', 'manifest arbitrariness'), and Annex 8-A concerning the interpretation of the concept of indirect expropriation ('manifest/y excessive measures').[973]

The CETA Joint Committee adopts interpretations of investment protection provisions, which would be binding on the Tribunal in future cases as provided in Article 8.31.[974] This could amount to a serious concern. The provisions could be applied to remedy interpretations of investment protection standards that do not respect the parties' shared understandings of their meaning.

A regular review of the obligations by the parties is provided in Article 8.10[975] with respect to the fair and equitable treatment standard. However, this review is limited to remedial powers to compensation. It remains for the parties to agree on interpretations of investment protection in relation to the limitation of the express provision on the right to regulate, and the restrictive wording of investment protection standards. In accordance with the European Parliament's legal assessment, it could be viewed that the envisaged investment protection mechanism cannot be considered the essential character of the powers of EU's institutions, because the risk of a deferent effect is not present.[976]

2.2.3 Uniform Application of EU Law

It is possible to consider autonomy in the sense of the integrity of the EU Treaty in order to ensure its effective implementation in the Member States.[977] The EU's character is considered *sui generis*, since it has become '(…) increasingly artificial to describe the legal

[971] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[972] Ibid.

[973] Ibid.

[974] Ibid.

[975] Ibid.

[976] European Parliament Legal Service 'Legal Opinion: Compatibility with the Treaties of Investment Dispute Settlement Provisions in EU Trade Agreements' 2016 D(2016)16759 <http://www.europarl.europa.eu/cmsdata/110465/sj-0259-16-legal-opinion.pdf> accessed 8 March 2018, para. 75.

[977] C-6/64, Costa v. E.N.E.L. (n 28), p. 594.

structure and processes of the Community with the vocabulary of international law (…)'.[978] The increasing engagement in international *fora* has triggered questions regarding legal and institutional relationship of the EU with international law.[979]

Autonomy was first mentioned as a principle in the early 1990s, confirming that earlier cases had implicitly referred to it as a constitutional principle.[980]

The base for the development of an autonomous EU legal order was initially laid down by the CJEU through introducing a constitutional value for the relationship between the EU and its Member States.[981] The relationship between the EU legal order and international law was redefined[982] by differentiating the two orders proposing that the Treaty '(…) is more than an agreement which merely creates mutual obligations between the contracting states.'[983] The Treaty should therefore rather be defined as '(…) a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields (…)'.[984] In this regard, the EU law was considered to be a legal order distinct from the Member States' legal order, and in this sense, autonomous. Autonomy in this regard refers to the extent to which organisations are being independent actors on their own right on the international plane, and also to the development of the legal order to be 'impermeable' to external influences. In other words, '[a]utonomy as institutional independence is also what gives the organization the possibility of acting as an independent member of the international community.'[985]

In the *Costa v. E.N.E.L* case, the concept of autonomy was considered in regard to the relationship between the EU and the Member States' national law.[986] This case can be considered to have marked a turning point, since the 'new legal order' of international law phrasing from *Van Gend en Loos* changed into the EU legal order.

The EU legal order was clearly separated from international law and considered entirely different. The EU law is applied through national law because of its supranational source, whereas international law is applied through an act of a state which makes the international law

978 Weiler, Haltern, 'The Autonomy of the Community Legal Order - Through the Looking Glass' (n 958).

979 Eckes, 'The European Court of Justice and (Quasi-) Judicial Bodies of International Law' (n 35), p. 85.

980 Barents, *The Autonomy of Community Law* (n 33), p. 182. The concept of autonomy was introduced merely to support the notions of direct effect and supremacy of EU law, in order to achieve full effectiveness of the treaty, between the EU internally and the Member States domestic legal orders.

981 Ibid, pp. 182-183.

982 Ibid, pp. 240-243. Barents means that the issue of autonomy can be traced back to the case law of the ECSC-Court.

983 Judgment of the Court of Justice of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, ECLI:EU:C:1963:1, p. 12.

984 Ibid, p. 12.

985 Jean D'Aspremont, 'The Multifacted Concept of Autonomy of International Organizations: A Challenge to International Relations Theory?' in Richard Collins and Nigel D White (eds), *International Organizations and the Idea of Autonomy : Institutional Independence in the International Legal Order* (Routledge 2011), p. 70.

986 C-6/64, Costa v. E.N.E.L. (n 28). This case concerned the question of the status and effect of the EEC Treaty in the domestic legal orders.

applicable.[987] 'By contrast with ordinary international Treaties, the EEC Treaty has created its own legal system, which (…) became an integral part of the legal systems of the Member States (…).'[988]

The cases of *Van Gend en Loos* and *Costa* were in relation to the establishment of the internal market and provided an image of an autonomous EU legal order in existence of independent external legal processes; not only domestically, but also in relation to international law.[989]

At the time of the EEC Treaty, the EEC Treaty itself was considered an international agreement, and should for this reason, be applied in accordance with the principles of international law. However, each Member State having significantly diverging domestic regulations on the effect and applicability of international agreement led to the limiting of the effectiveness of the Treaty, which was necessary for a full establishment of the internal market.[990]

2.2.4 Allocation of Power to the EU Unaltered

The principle of autonomy has, according to the CJEU, also been understood to comprise the allocation of powers between the EU and its Member States, in the way that is should prohibit institutional arrangement that would allow external bodies to delineate the competence of the EU from those of the Member States.[991]

It is of essence that the allocation of powers between the EU and its Member States remains unaltered.[992] In certain situations, it can become more difficult. For instance, an international court is competent to determine who will be the responsible contracting party, the respondent in a proceeding, the EU or the Member States. However, such determination made by an international tribunal would be likely to have an impact on the allocation of competences between the EU and its Member States according to the CJEU in Opinion 1/91. This would in turn result in being incompatible with the autonomy of the EU legal order.[993]

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[987] Tietje, Wackernagel, 'Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration' (n 31), p. 215.

[988] C-6/64, Costa v. E.N.E.L. (n 28), p. 593.

[989] Agata B Capik, 'Five Decades since Van Gend en Loos and Costa Came to Town: Primacy, Direct and Indirect Effect Revisited' in Steven Blockmans and Adam Lazowski (eds), *Research Handbook on EU Institutional Law* (Edward Elgar Publisher 2016), pp. 419-420.

[990] Jan W van Rossem, 'The Autonomy of EU Law: More is Less?' in Ramses A Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (T.M.C. Asser Press 2013).

[991] 1/00, Opinion Establishing a European Common Aviation Area (n 785) para. 15.

[992] Ibid, para. 12.

[993] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), paras. 30-36.

In Opinion 2/13, the European Court of Human Rights had the arrangement to determine the respondent in its proceedings, and this was considered to affect the competence, and thus was regarded as incompatible with the Treaties.[994]

However, the CETA has tried to avoid such issues as in Opinion 2/13, in the way that it will rather be an EU's institution to determine the respondent in a procedure, and not a judicial body acting outside the EU's institutional framework. The CETA provides in Article 8.21[995] that it is the EU which is competent to determine whether the EU or a Member State should act as the respondent in a process. The EU's decision on the determination of the respondent should then be binding on the tribunal. As provided in the provision, there is no further precision in regard of which institution of the EU should function as the competent to determine the respondent. The reason hereto is basically that the international agreement may in principle not interfere with the allocation of competences within the EU in regard to the procedure as well as the criteria for the determination of the respondent in investment disputes under international agreements according to the EU Regulation (EU) No 912/2014 establishing a framework for managing financial responsibility.[996]

In this aspect, it can be concluded that in relation to the delineation of competences, the CETA's Investment Chapter respects the autonomy requirements under EU law.[997]

2.3 International Courts' and Tribunals' Limits of Interpreting the EU

External autonomy can be seen from two different angles. On the one hand, the EU functions as a self-referential system, where it is independent of international law. The CJEU claims that the autonomous order is to effectively exclude international law from having an impact on the interpretation and application of EU law within the respective domestic legal orders of the Member States.[998] On the other hand, the EU autonomy functions through the protection of institutional structures and prerogatives, where the CJEU's attempts are to extend the concept of autonomy, in order to further include international regimes into the institutional framework.

The concept of autonomy has developed over time not just to be present *vis-à-vis* the Member States, but also between the EU law and the public international law. The autonomy,

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[994] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), paras. 224, 225 and 234.

[995] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article. 8.21.3 'The European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent'.

[996] 'European Parliament and the Council, establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party', p. 121.

[997] European Parliament Legal Service 'Legal Opinion: Compatibility with the Treaties of Investment Dispute Settlement Provisions in EU Trade Agreements' (n 976); C-459/03, Commission v Ireland (n 625), p. 83.

[998] Barents, *The Autonomy of Community Law* (n 33), p. 259.

in relation to both the national and international law, is guarded by the CJEU, which pursuant to Article 19(1) TEU, is granted binding jurisdiction to interpret and apply EU law.[999]

2.3.1 Comparison the ICS to Other External Court Systems

There is a very fine line between an investment tribunal that deals with the clauses in the FTAs, and an investment tribunal that applies and interprets EU law.[1000] For further analysis of such, it is necessary to distinguish the different systems for arbitration, and the way they function.

2.3.1.1 Comparison to the European Economic Area (EEA) Agreement

In relation to the EEA agreement, the CJEU noted that in circumstances, where a system of courts is included in an international agreement, also in relation to dispute settlement between the contracting parties, decision stemming from such courts will be binding on the EU insofar as the agreement is an integral part of the EU law.[1001] This was not, however, the case for the EEA agreement, since the agreement was written in such a way that it was identical to the wordings of the EU provisions, including rules that govern secondary legislation in relation to internal rules on economic and trading relations, and fundamental provisions of the EU legal order.[1002] It naturally means that in circumstances, where the CJEU retains its interpretive privilege, the interpretation of EU law will lead to an incompatibility of the international agreement with the principle of autonomy. To view the exact impact, Opinion 1/09 should be considered.[1003] This case concerned the CJEU's assessment of the EPCt in the light of its conformity with the Treaty, where the focus remained on the institutional implications rather than the EPCt's jurisdiction to deliver binding interpretations on EU legislation. The CJEU considered it essential to replace domestic courts in the task of interpreting and applying EU patents law, holding that it '(…) would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU.'[1004]

In Opinion 1/91, the court concluded that the draft agreement, which meant to establish the EEA aiming for the Member States of the EEA to fully participate in the internal market without EU's membership,[1005] would be '(…) likely to adversely affect (…) the autonomy of

[999] Article 19(1), TEU second sentence, 'It shall ensure that in the interpretation and application of the Treaties the law is observed'.

[1000] Markus Burgstaller, 'Investor-State Arbitration in EU International Investment Agreements with Third States' (2012) 39 Legal Issues of Economic Integration 207, p. 221.

[1001] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), para. 39.

[1002] Ibid, paras. 41 and 42.

[1003] 1/09, Opinion Establishing European Patent Court (n 448).

[1004] Ibid, para 80.

[1005] Brandtner, 'Drama of the EEA Comments on Opinions 1/91 and 1/92' (n 956).

the [EU] legal order (…)'.[1006] The matter of establishing international courts and tribunals under EU agreements is developed through the restrictive opinions of the CJEU.[1007] The EEA agreement tried to reproduce provisions from the internal market, establishing an independent judicial body, the EEA court, to interpret the EEA agreement in case of disputes. In this regard, the EEA court was essentially interpreting the provisions of the EEA agreement, which were identical to the ones in the EU Treaty provisions. The CJEU argued that such interpretation would restrain the CJEU in the interpretation and application of the Treaty internally, affecting the uniformity of both, the EEA court and the CJEU, separately.[1008] However, after the modification, EFTAct was considered compatible with EU law while interpreting the EEA agreement in Opinion 1/92.[1009]

From a legal point of view, the EU would not have to be bound by any interpretation of the EFTAct, however, the fact that there would not be a homogenous interpretation made the CJEU reject the EEA draft agreement. After revising the agreement,[1010] it was decided to establish the EFTAct jurisdiction of which covered the limited territory of EEA's countries with the possibility to make preliminary ruling by binding nature to the CJEU for interpretation.[1011]

The principle of autonomy applies as a principle to internal matters where the domestic courts are required to interpret and apply EU law in national courts. Similarly, the principle applies in relation to the external application, where international courts and tribunals are precluded from exercising any activity to interpret EU law.[1012]

Opinion 1/91 demonstrates the CJEU's attempts to protect the integrity of the EU law externally. By referring to its own judicial prerogatives under the Treaty, it hinted at a more institutional dimension of the autonomy principles.[1013]

The principle of autonomy has been largely developed[1014] since Opinion 1/00.[1015] The European Common Aviation Area aimed at extending the air transport of the EU's internal market, by also including the EFTA countries, in addition to some Central and Eastern European states. The draft agreement was inspired by the EEA; however, instead of having an

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[1006] 1/00, Opinion Establishing a European Common Aviation Area (n 785); 1/09, Opinion Establishing European Patent Court (n 448); 1/91, Opinion on European Economic Area EEA Agreement I (n 447), para 35.

[1007] Rass Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal dDscourses* (Kluwer Law International 2008), Chapter. 5.3.2.

[1008] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), paras. 41-46.

[1009] Brandtner, 'Drama of the EEA Comments on Opinions 1/91 and 1/92' (n 956), p.320

[1010] 1/92, Opinion on European Economic Area EEA Agreement II (n 963).

[1011] Ibid, para. 34.

[1012] Eckes, 'The European Court of Justice and (Quasi-) Judicial Bodies of International Law' (n 35), p. 88.

[1013] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), para. 35.

[1014] Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal dDscourses* (n 1007), p. 85.

[1015] 1/00, Opinion Establishing a European Common Aviation Area (n 785) This case concerns the agreement establishing a European Common Aviation Area (ECAA), the drafting of an agreement inspired by the EEA.

independent judicial body, a joint committee was established to overlook the interpretation and application of the agreement by national authorities and domestic courts.[1016] This Opinion systematically developed the principle of autonomy, by providing a clear and precise definition of the different elements.

In this regard, there are certain limitations for an international court or tribunal to conform to the principles of autonomy. Opinion 2/13 concerns the EU's accession to the European Convention on Human Rights pursuant to the Accession Agreement. The case discusses the principles of primacy and autonomy in relation to the Accession Agreement.[1017] The opinion demonstrates the relationship between EU law and international law, and between the CJEU and other international courts and tribunals. The CJEU argued, viewing the case from a pluralistic viewpoint,[1018] that the EU is an autonomous legal regime that exists independently of international law.[1019]

Contrary to the EU's commitment reflected in the Treaties,[1020] in certain situations, the CJEU manifests limits to EU's development as an international actor. The draft agreement on the EU's accession to the European Convention on Human Rights was in fact '(…) liable adversely to affect the specific characteristics of EU law and its autonomy.'[1021]

2.3.1.2 Comparison to the WTO Dispute Settlement Mechanism

It is important to first highlight the difference between the WTO dispute settlement mechanism, and the ISDS mechanism. In the WTO dispute settlement mechanism, there are no possibilities for an individual complaint mechanism for private individuals.[1022] Moreover, there is a clear room for diplomatic negotiation in situation where a violation of the WTO commitments has been established.[1023] The reports by the WTO appellate body are fully binding to all WTO members to implement, however, the CJEU has clearly denied them direct effect under EU law.

This leads to the conclusion that neither WTO law, nor the decisions of the WTO Appellate Body can be enforced through EU law. One could suggest that the clear difference

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[1016] Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal dDscourses* (n 1007), p. 86.

[1017] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449).

[1018] Because of the emphasis on a separation rather than an integration; it is possible to conclude that the CJEU would argue for more of a dualistic coexistence.

[1019] Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 Harvard International Law Journal 1, The same rhetoric by the CJEU is to be found also in the case of Kadi, Joined Cases C-402/05 P and C-415/05 P, Kadi (n 427).

[1020] Article 21, TEU.

[1021] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 200.

[1022] European Parliament Legal Service 'Legal Opinion: Compatibility with the Treaties of Investment Dispute Settlement Provisions in EU Trade Agreements' (n 976), para. 13 and 1/94, Opinion on World Trade Organization Agreement (n 27).

[1023] Steffen Hindelang, 'Repellent Forces: The CJEU and Investor-State Dispute Settlement' (2015) 53 Archiv des Völkerrechts 68, p. 80.

between the WTO and the ICS is that the investment arbitration system will have a somewhat stronger enforcement mechanism.[1024] In the ICS, the respondent Member State must enforce awards delivered by the investor-state body.[1025]

It can be concluded that in fact, in many instances, the WTO dispute settlement mechanism has indeed examined EU law or EU instruments. The EU can protect itself from such scrutiny through a denial of direct effect.

2.3.1.3 Comparison to the EU Adhesion to the ECHR

The ISDS's spillover effect can be considered to be overstated. It could rather be considered that the 'spillover effects' arising from ISDS are similar to those flowing from the WTO dispute settlement mechanism, and from any other dispute settlement mechanism.[1026] However, if one considers the very nature of the European Court of Human Rights (ECtHR) and the WTO Dispute Settlement mechanism that are very different in its substance.

The ECtHR it is not at all an institution, which is exclusively established in order to protect the right of investors.[1027] The ECtHR should instead serve to protect all rights and duties.

The possibility of accession of the EU to the European Convention on Human Rights (ECHR) is provided through Article 6(2) TEU together with protocol 8, which states that the accession has to preserve the specific characteristics of the EU legal order. These two articles can be considered to be the result of Opinion 2/94.[1028]

There is an elaborated system, in which the ECtHR refers questions on the interpretation of EU law to the CJEU, as established in the Accession Agreement. This system looks similar to a preliminary ruling procedure and will similarly in this way preserve the autonomy of the EU legal order. The proposed agreement was rejected by the CJEU in Opinion 2/13.[1029] The CJEU stated that the exclusive nature of the procedure for settling those disputes, in relation to the jurisdiction of the CJEU, should preclude any prior of subsequent external control.[1030]

[1024] Herrmann, 'The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy' (n 739), p. 583.

[1025] Davide Rovetta, 'Investment Arbitration in the EU After Lisbon: Selected Procedural and Jurisdictional Issues' in Marc Bungenberg and Christoph Herrmann (eds), *Common Commercial Policy after Lisbon*, vol European Yearbook of International Economic Law (Springer 2013), p. 230.

[1026] Herrmann, 'The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy' (n 739), p. 582, Schill, 'Luxembourg Limits: Conditions For Investor-State Dispute Settlement Under Future EU Investment Agreements' (n 944), p. 50.

[1027] Andreas Fischer-Lescano and Johan Horst, 'The Limits of EU and Constitutional Law for the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) ' (2014) Translated into English by Elisabeth Schmalen Legal Opinion on Behalf of Attac/Munich <http://docplayer.net/41787104-The-limits-of-eu-and-constitutional-law-for-the-comprehensive-economic-and-trade-agreement-between-the-eu-and-canada-ceta.html> accessed 10 March 2018., p. 13.

[1028] 2/91, Opinion on Convention ILO on Safety in the Use of Chemicals at Work (n 322).

[1029] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449).

[1030] Ibid, para. 210.

A similar system was intended for the dispute settlement tribunals in the NGFTAs, giving the court a possibility to send questions in relation to the interpretation of EU law.[1031] However, as was the result of Opinion 2/13, such system would not be considered sufficient for the CJEU to guarantee the preservation of the specific characteristics of the European legal order. Moreover, since these are two different contexts, it might be the case that they cannot be compared. It can be argued for sure that Opinion 2/13 at least shows the CJEU's reluctance to external court systems, and its determination to protect the autonomy of the EU legal order.

2.3.2 Direct effect of the NGFTAs

The CJEU has established certain conditions of when to conclude that a provisions of a free trade agreement, accession or development association agreement have direct effect.[1032] Such provisions should be regarded directly effective when the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[1033]

The CJEU, opts in general for direct applicable international agreements, in circumstance where the nature and the broad logic of the nature of the agreement would not preclude it.[1034] In this regard, the purpose of the agreement, the will of the parties and also the question of reciprocity should be considered.

In the recent trade agreements concluded post-2008, direct effect has been expressly precluded from the agreement, which means that the agreement cannot apply in domestic EU and Member State legal order.[1035]

In other words, by expressly including such, the will of the parties was not to include direct effect. To include direct effect in this type of agreements could in itself be considered problematic. This is because if such agreement would be considered to have direct effect automatically, Korean operators, i.e. those providing goods or services to the EU, would be put in a better position compared to EU's operators or operators from other countries which do not trade with goods or services linked to the KOREU agreement. The proposition was given by

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[1031] Herrmann, 'The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy' (n 739), p. 583.

[1032] Judgment of the Court of Justice of 26 October 1982, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, C-104/81 ECLI:EU:C:1982:362, paras 22–23; Judgment of the Court of Justice of 14 September 2006, *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, C-162/96, ECLI:EU:C:1998:293 para 31 (EEC-Yugoslavia CA).

[1033] Judgment of the Court of Justice of 30 September 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd*, C-12/86, ECLI:EU:C:1987:400, para 14. The concerned an association agreement between the EEC and Turkey in the area of Freedom of movement for workers. It has further been cited in cases such as, Judgment of the Court of Justice of 29 January 2002., *Land Nordrhein-Westfalen v Beata Pokrzeptowicz-Meyer*, C-162/00, ECLI:EU:C:2002:57 para 19, (EA with Poland).

[1034] Judgment of the Court of Justice of 3 June 2008, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, C-308/06, ECLI:EU:C:2008:312, para. 45.

[1035] Semertzi, 'Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (n 808), p. 1127.

the Commission and it was ultimately accepted by the Council that decided that the agreement should not provide direct effect.[1036] It would moreover mean that individuals would have the possibility to invoke the provision of the agreement before either EU courts or domestic courts of the Member States. Such provision allowing for direct effect could therefore allow both the CJEU and the domestic court to correct supranational legislation.

However, it does not preclude that the provision that the provisions which are based on the WTO could, in relation to their link to the WTO may be directive effective in this regard the nature and the structure of the WTO agreement should be considered together with the whether the provision is considered 'clear precis and conditional".[1037]

2.3.3 Indirect Effect

However, the NGFTAs may also have an indirect effect on the EU. The indirect effect stems from a way of consistent interpretation doctrine.[1038] This interpretive principle is based on the interpretation of EU law in domestic courts where the primacy of EU agreements over EU secondary legislation, meant that EU's secondary legislation should as far as possible be interpreted consistently.[1039] This logic is close to the logic within domestic courts dealing with international obligations, where such international obligation is to shape the interpretation of inferior norms in order to avoid to breach international obligation to evade international responsibility.[1040] However, this approach is limited, specifically when there is a clear conflict between the domestic measures and the international agreement.

International agreements are seen as an integral part of the EU legal order. It is considered to be above and primary to provision of EU's secondary legislation and also Member States' national law. This naturally results in that '(…) such provisions must, so far as possible, be interpreted in a manner that is consistent with those agreements.'[1041] Since a lot of agreements have direct effect, the consistent interpretation is not often applied.[1042]

[1036] Article 8, Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2010] OJ L127, 'The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals'.

[1037] Judgment of the Court of Justice of 12 December 1972, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, 21/72 to 24/72, ECLI:EU:C:1972:115, para 20;Judgment of the Court of Justice of 5 October 1994, *Federal Republic of Germany v Council of the European Union*, C-280/93, ECLI:EU:C:1994:367, para 110 (spirit, general scheme and terms of GATT agreements); Judgment of the Court of Justice of 23 November 1999, *Portuguese Republic v Council of the European Union*, C-149/96 ECLI:EU:C:1999:574, para 47.

[1038] Frederico Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012), p. 395.

[1039] C-61/94, Commission v Germany (n 800), para. 52.

[1040] Mario Mendez, *The legal effects of EU agreements* (Oxford University Press 2012), p. 197.

[1041] C-61/94, Commission v Germany (n 800), para. 52.

[1042] Eeckhout, *EU External Relations Law* (n 260), p. 356.

However, in relation to the NGFTAs, it may be an extremely useful instrument, in order to guard a better unity when applying the agreements. The CJEU has certain situations in which it was required to interpret the provisions in conformity with WTO.[1043] With this line of reasoning, it seems possible to conclude that the NGFTAs, as international agreements, can lead to that EU's secondary and national law will be subject to interpretation. This interpretation would then naturally be in conformity with the NGFTAs. However, the indirect effect is not a complete substitute to direct effect.[1044]

Consequently, the effect from this type of agreements may affect also other actors at the domestic level, who have to comply with the obligations assumed under the agreements and are not necessarily limited to their legal effect. This becomes important, specifically in relation investor-state arbitration, where non-compliance to the agreement can mean expensive violations.[1045]

2.4 ICS Procedure and Compatibility with EU Law Autonomy

The question in relation to the EU's competence on whether the ISDS mechanism is compatible with the protection offered by the CJEU will be closely examined in this section. Firstly, this section will examine the ISDS provisions by considering whether they could alter the *sui generis* nature of the EU legal order, whether the *MOX Plant* case-law could in fact be transposable to the issue of the ISDS, and whether Article 344 TFEU can constitute certain limitations in this regard. Secondly, it will consider the autonomy of the EU in relation to the ISDS.

The CJEU has always accepted the WTO dispute settlement. The Court's reaction has thus been different in relation to the ECtHR. The Commission argues that the EU is already subject to the WTO dispute settlement mechanism and is negotiation the ECHR accession. For this reason, the ISDS should be compatible with EU law. When regarding the compatibility of the ICS, it is not possible to use the two examples as clear-cut evidence of that the ISDS mechanism would be in line with EU law. However, these examples can instead make us better

[1043] C-53/96, Hermès International (n 312), para. 28; Judgment of the Court of Justice of 9 January 2003, *Petrotub SA and Republica SA v Council of the European Union*, C-76/00, ECLI:EU:C:2003:4, paras. 49-64; Pieter Jan Kuijper and Marco Bronckers, 'WTO Law in the European Court of Justice' (2005) 42 Common Market Law Review 1313, p. 30; Jan-Peter Hix, 'Indirect Effect of International Agreements: Consistent Interpretation and Other Forms of Judicial Accommodation of WTO Law by the EU Courts and the US Courts' (2013) No.03/13 Jean Monnet Working Paper Series <http://jeanmonnetprogram.org/wp-content/uploads/2014/12/Hix.pdf> accessed 17 December 2017.76-1382.

[1044] Hix, 'Indirect Effect of International Agreements: Consistent Interpretation and Other Forms of Judicial Accommodation of WTO Law by the EU Courts and the US Courts' (n 1043), p. 11.

[1045] Jacques Bourgeois and Orla Lynskey, 'The Extent to which the EC Legislature Takes Account of WTO Obligations: Jousting Lessons from the European Parliament' in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press 2008), p. 202. Amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community, Recital 4 stating that the proposed amendment to the regulation 'should be read in the light of the Appellate Body's clarifications'.

understand the mechanism and view a clear picture of what could be the issues of the ICS and ISDS. This section will provide more of a profound analytical discussion on the CJEU's reactions to external court system.

More importantly is the autonomy of the EU legal order. In fact, as the Trade Commissioner Cecilia Malmström recognized, the principle of autonomy can be considered a real limitation in the EU's approach to investment protection. In fact, it would not be the conferral jurisdiction on a court or a tribunal in itself that would cause the issue with autonomy but rather the potential 'spillover effects' that a decision by such court or tribunal would later generate.[1046] To move investment arbitration from *ad hoc* arbitration to an investment court could clearly facilitate investment arbitration.[1047]

The compatibility of ISDS proceedings should be considered in relation to the EU's institutions and bodies. The question of compatibility was put forward in the legal opinion of the European parliament.[1048]

The CJEU's interpretation of the principle of autonomy of the CJEU in Opinion 1/09, does not leave much space for an ISDS mechanism. In the CETA and EUSFTA, the ISDS is put to only apply the agreement and other rules and principles of international law applicable between the parties to the agreements. In this way, it would exclude domestic law that means both, the EU law and Member States domestic law.[1049]

As provided in the TTIP:

> (…) for greater certainty, (…) the domestic law of the Parties shall not be part of the applicable law. Where the tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party.[1050]

As this provision clarifies, it is up to the contracting parties to make the interpretation of their domestic law, and that only such interpretation will be considered in the tribunal. However, it should be excluded that there may be an adverse spillover effects to a decision made from an investor-state tribunal.[1051]

[1046] Hindelang, 'The Autonomy of the European Legal Order' (n 916), p. 190; Hindelang, 'Repellent Forces: The CJEU and Investor-State Dispute Settlement' (n 1023), p. 73.

[1047] European Commissioner for Trade 'Concept Paper, Investment in TTIP and Beyond – the Path for Reform. Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court' (n 772).

[1048] European Parliament Legal Service 'Legal Opinion: Compatibility with the Treaties of Investment Dispute Settlement Provisions in EU Trade Agreements' (n 976).

[1049] European Commissioner for Trade 'Concept Paper, Investment in TTIP and Beyond – the Path for Reform. Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court' (n 772), p. 10.

[1050] European Commission Textual Proposal Customs and Trade Facilitation, EU-US TTIP Negotiations (795), Article 13(3) entitled 'Applicable law and rules of interpretation'.

[1051] Gisèle Uwera, 'Investor-State Dispute Settlement (ISDS) in Future EU Investment-Related Agreements: Is the Autonomy of the EU Legal Order an Obstacle?' (2016) 15 The Law & Practice of International Courts and Tribunals 102, p. 133.

The ISDS mechanism may as we have seen have spillover effects on EU law. The possibility to overcome such would be to limit remedies that foreign investors are exposed to. The CJEU needs to contain their competence and remain '(…) competent to determine – de iure and de facto – the legality of the acts of EU institutions under EU law as required in Opinion 1/00'.[1052] The consequence could, however, be that the protection of foreign investors would be undermined.

2.4.1 The Effect of Arbitration Procedures on EU Autonomy

The EU's future investment agreements, such as the NGFTAs, demonstrate that the judicial activity of investor-state tribunals is similar to an adjudicative review of EU's legal acts *vis-à-vis* the investment agreement.

One could reason that the principle of autonomy has developed into a *de facto* protection of the Court's own judicial prerogatives at the cost of creating an obstruction to the EU's development as an international actor.[1053] The fact that such activity is similar would result in that the CJEU is restrained in its task to interpret the EU secondary law in the context of EU's agreements. It can affect the essential characteristics of EU law consisting of the principle of autonomy, since the investment tribunals would engage in a judicial activity, which is reserved to the CJEU under the Treaty.

The interpretation of the principle of autonomy by the CJEU could pose a problem in itself for EU's further international development if the recent trends provide so. The fact that the EU should fulfil its international obligation is also important from a political perspective.[1054]

Whether such political perspective, that international trade and investment agreements represent, will be sustainable remains to be seen.[1055] In fact, there is a need for the CJEU to overlook the interpretation and application of the principle of autonomy.[1056]

Both agreements, the EEA[1057] and ECAA,[1058] concern more or less literal reproductions of EU Treaty provisions. The EPCt was explicitly charged with the competence to interpret and

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[1052] Schill, 'Luxembourg Limits: Conditions For Investor-State Dispute Settlement Under Future EU Investment Agreements' (n 944), p. 46.

[1053] Lenk, 'Investment Arbitration under EU Investment Agreements: Is There a Role for an Autonomous EU Legal Order?' (n 30), p. 139.

[1054] Lavranos, 'The ECJs Relationship With Other International Courts' (n 807), pp. 394-395 and pp. 408-409.

[1055] Schill, 'Opinion 2/13 - The End for Dispute Settlement in EU Trade and Investment ' (n 808), p. 288. 'Only an EU that is empowered to participate actively in, and fully submits to binding international dispute settlement, is able to demand the same of other countries, and thereby contribute to shaping the future world order according to its own values'.

[1056] Tietje, Wackernagel, 'Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration' (n 31), p. 241–44, European Commission exercising self-restriction in relation to EU state aid rules in order to coordinate competing legal orders that is based on the Bosphorus-principle and focuses on investment tribunals.

[1057] 1/91, Opinion on European Economic Area EEA Agreement I (n 447); 1/92, Opinion on European Economic Area EEA Agreement II (n 963).

[1058] 1/00, Opinion Establishing a European Common Aviation Area (n 785).

apply EU patents law. Another example is the EU Accession Agreement, where the legal provision in relation to the ECHR was not only provided by EU Treaties, but also developed in the protocol of the TFEU.

Such cases, however, do not limit the application of the principle of autonomy to international courts and tribunal.[1059] In this sense, the CJEU is regarding the cases more from a constitutional perspective. Instead of concentrating on the protection of the EU integrity, it focuses on the autonomy of the EU, and the protection of institutional prerogatives.

Since Opinion 1/00, the CJEU employed the aspects of safeguarding the allocation of competence as an umbrella term for the application of the principle of autonomy.[1060] Opinion 1/09 is based on the institutional dimension of autonomy, protecting the powers of the CJEU to provide interpretations of EU law by virtue of having recourse to the role of domestic courts.[1061] Furthermore, it suggests that as long as its judicial activity circumvents 'judicial dialogue' between domestic courts and the CJEU, the principles do not presuppose that an internal court or tribunal is given an express mandate to interpret and apply EU law.[1062] In this regard, other courts or tribunals cannot transfer the jurisdiction from the CJEU to review EU law for the purpose of interpreting provisions of international agreements; particularly not in relation to areas that are covered by the EU's exclusive competence. In Opinion 2/13, the CJEU clarified that the ECtHR cannot view whether the EU law is consistent with the ECHR, because this would breach the exclusive jurisdiction of the CJEU to interpret EU law.[1063]

In this case, it is clear that the principle of autonomy is imperative when it comes to assessing the compatibility between the ISDS provisions in EU investment agreements. In fact, the activity of investment tribunals is more akin to international judicial review than it is to private arbitration, since it considers that the investor-state tribunal's core task under EU investment agreements is to determine the compatibility of EU's legal acts with international standards of investment protection. Given the wide interpretation that the CJEU uses in its argumentation, the important aspect to look at is whether the ISDS provisions may actually affect the principle of autonomy, and the essential characteristics of powers conferred upon the Court under the Treaties.[1064]

[1059] Dimopoulos, 'The involvement of the EU in Investor-State Dispute Settlement: A question of Responsibilities' (n 965).

[1060] Lenk, 'Investment Arbitration under EU Investment Agreements: Is There a Role for an Autonomous EU Legal Order?' (n 30), p. 146.

[1061] Opinion 1/09, Opinion Establishing European Patent Court (n 448), paras. 84 and 89.

[1062] Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775), p. 563.

[1063] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 246.

[1064] Lenk, 'Investment Arbitration under EU Investment Agreements: Is There a Role for an Autonomous EU Legal Order?' (n 30), p. 147.

As the principle of autonomy was primarily used to refer to internal threats to the EU in relation to its Member States, however, should be considered also in relation to external interferences to EU law. The conditions for safeguarding the EU autonomy, three conditions have been identified through case-law.[1065] Firstly, the EU and its Member States should not be bound by a particular interpretation of EU rules referred to in such agreements. It should secondly not be possible to alter the power between the EU and its Member States. The third condition establishing the essential character of the powers of the EU's institutions should also remain unaltered.[1066]

Not to bind the EU and its Member States by a particular interpretation of rules, referred to in an agreement, is something considered as 'particularly important' for the CJEU.[1067]

The CJEU has an important position to safeguard, and not to alter the allocation of power to the EU and its Member States and the essential character of the EU's institutions.[1068]

International courts or tribunals cannot bind the EU and its institutions, if they make interpretation of EU law.[1069] Decisions given by international courts and tribunal should also not affect the essential characteristics of powers that are conferred by the Treaties upon EU's institutions.[1070] This includes both the interpretation of the allocation of competence between the EU and its Member States, as well as the requirement not to alter the essential characteristics of powers allocated to the institutions under the Treaty. The question on how it would be possible for the interpretation of an external judicial body to bind the CJEU is not easily conceivable. In order to be able to make such an assessment, the attention must first be given to the institutional structure of a court or tribunal in the NGFTAs.

2.4.1.1 ICS Composition Threatening Recognition and Enforcement of its Decisions

Both, the EUVFTA and CETA, refer to the New York Convention in relation to the recognition and enforcement of arbitral awards. However, the actual composition of the ICS can in fact directly threaten the recognition and enforcement of its decisions in the sense that it is more of a judicial composition than an arbitral composition, which in turn would make it fall outside the scope of the Convention.[1071]

[1065] Inge Govaere, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010), p. 192.

[1066] Hindelang, 'The Autonomy of the European Legal Order' (n 916), pp. 190-192.

[1067] 1/00, Opinion Establishing a European Common Aviation Area (n 785), paras. 11 and 13.

[1068] Ibid, para. 12, which lists those last two conditions together.

[1069] Ibid, paras. 11, 13.

[1070] Ibid, paras. 12, 16, 21.

[1071] Pantaleo, 'Lights and Shadows of the TTIP Investment Court System' (n 798), pp. 85-87.

In fact, in order to guarantee their independence and availability on short notice, the arbitral members of both the tribunal and the appeal tribunals are compensated financially through their 'retainer fee'. In this regard, the EUVFTA and CETA will determine the remuneration of the judges at a later stage.[1072]

The TTIP proposal departs from these solutions by a retainer fee of 2000 Euro for judges of the tribunal, and 7000 Euro for members of the appeals tribunal.[1073] In line with Regulation 14, para. 1, Administrative and Financial Regulations of the ICSID Convention, the members of the tribunal should be paid with a daily fee for their activity in the panels.[1074] In the agreements, the decisions for remuneration should be determined by a decision of the committees. In both agreements, there are no references for any such calculation of any daily fees.

In the TTIP's proposal, the retainer fee for members of the tribunal was considered only to be one third of the amount provided for members of the WTO appellate Body. Regarding the guarantee of the independence of the members of the tribunal, there has been a lot of criticism against an insufficient amount.

The relevant question is then not whether an investment tribunal could interpret the NGFTA, but rather whether the investment agreement *per se* could have issues that fall within the scope of EU law.

If the investor-state tribunal is requested to determine whether the precisions of an EU secondary law instrument violates the investors right in regard to an investment protection provision established in the agreement,[1075] it would naturally lead to analyse and interpret the applicable EU law.[1076]

The arbitral tribunal considered that the arbitral award was not affected by the States accession to the EU, and that the States still remained responsible in their obligation under the BIT, ICSID Convention and the New York Convention.[1077]

[1072] EU-Vietnam Free Trade Agreement, Article 12, para. 14, and Article 13, para. 14, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.27, para. 12, and Article 8.28, para. 7, (d).

[1073] European Commission Textual proposal to the EU negotiaion of Transatlantic Trade and Investment Parternship (TTIP), Article 9, paras. 10-12.

[1074] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 33 Article 12, para. 16; EU-Vietnam Free Trade Agreement, Article 8.27, para. 14.

[1075] European Commissioner for Trade 'Concept Paper, Investment in TTIP and Beyond – the Path for Reform. Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court' (n 772), p. 10.

[1076] Rovetta, 'Investment Arbitration in the EU After Lisbon: Selected Procedural and Jurisdictional Issues' (n 1025), p. 230.

[1077] Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, para. 321.

The award was further challenged by the Commission,[1078] and then brought in front of the CJEU to determine whether an arbitral award against Romania can be considered as an illegal State aid as supported by the Commission.[1079] The question was therefore whether they would violate EU law if they were to comply with the arbitral award and compensate the damage suffered by the investor. In this sense, it would not be the arbitration itself, but rather the application of the arbitral award. This clearly demonstrates that the principle of autonomy of EU law may be violated even in circumstances where an investment tribunal strictly apply international law.

There could also be the possibility that throughout the assessment of the claims brought by an investor, an investment tribunal may be considered to directly apply EU law. In fact, the investment chapter can contain applicable law clauses, which provide for treaty standards and encompass the law of the host State,[1080] which in turn, would consequently mean that they may rule on EU law. As put in Opinion 1/09, the external jurisdiction should not call the CJEU's exclusive task of interpreting, applying and reviewing the legality of the acts of the EU.[1081]

2.4.1.2 The Procedure in the ICS

The contradiction of an ISDS system in respect to the EU autonomy seems not to derive from the *MOX Plant* established case-law, but rather from the principle of the autonomy of the EU legal order. This would be the case since an arbitral tribunal established under ISDS's clauses, or a tribunal of the ICS would in one way or another take part in, have the potential to interpret and apply EU law, or even consider international obligations which in one way or another involve EU law issues. Such effect of potential spillover of the interpretation and application of EU law could in this way alter the EU autonomy.

In relation to the international dispute settlement mechanism, the case-law of the CJEU indicates both, the limits for ISDS, and also the central design features of an ISDS mechanism which the NGFTAs must have in order to meet the requirements established by the Court. The accession to the ECtHR and the WTO dispute settlement mechanism are examples that could not easily be echoed in international dispute settlements, and specifically in the context of ISDS, mainly because of the great risk of spillover effects. Moreover, it is also very possible that the Member States and third states involved in the NGFTA would not consider the ISDS mechanism as it is provided in the current state of NGFTAs as an effective mechanism.

[1078] Ibid.

[1079] Judgment of the General Court of 29 February 2016, *Micula and Others v Commission*, T-646/14, ECLI:EU:T:2016:135.

[1080] Reinisch, 'The EU on the Investment Path - quo vadis Europe? The Future of the EU BITs and other Investment Agreements.' (n 944), p. 179.

[1081] Opinion 1/09, Opinion Establishing European Patent Court (n 448).

Consequently, one can draw the conclusion that there are considerable obstacles to the ISDS within the EU legal system.

The ISDS mechanism could only be accepted where it would not generate adverse effect on the EU autonomy. Incorporating the ISDS mechanism in NGFTAs could lead to an interference with the respective powers of the European institutions, and/or a distortion of the allocation of jurisdiction between the EU and its Member States.[1082]

The CETA states that '(…) Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party'.[1083] The fact that the CETA may consider domestic law as a matter of fact throughout its proceedings, leads us to a clear case of the possibility to interpret domestic law. However, '(…) any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.'[1084] The more important question to ask in this regard is whether such provision can be regarded sufficient in terms of an external tribunal interpreting domestic law. This section will further deal with this from a perspective of domestic law, since the EU in this sense is the contracting party.

Considering another point of view, once an international agreement comes into force, it becomes regarded as an integral part of the EU law.[1085] This naturally shows the difficulties in drawing the limits, as the domestic law of one of the parties can be considered as a matter of fact in the proceedings of a tribunal.

When carefully examining the CJEU case-law, one can distinguish a shift of focus by the CJEU from the protection of the integrity of EU law to the protection of the EU institutions. In fact, the safeguarding of the allocation of competence under the Treaty plays a big role for the principle of autonomy, since Opinion 1/00. For example, in Opinion 1/09, the CJEU argumentation is based on the harmonious interpretation of EU law, but the judgment itself is based on the institutional dimension of autonomy, more precisely, the protection of the CJEU's power of interpreting EU law. The CJEU stated that the Member States

> (…) cannot confer the jurisdiction to resolve … disputes on a court created by an international agreement which would deprive [national] courts of their task, as 'ordinary'

[1082] Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775), p. 564.

[1083] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.31.2.

[1084] Ibid, Article 8.31.2 CETA.

[1085] C-181/73, Haegemann v Belgian State (n 953), para. 5.

courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU.[1086]

The CJEU continued by acknowledging that the EU's competence

(…) in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit itself to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions.[1087]

Moreover, the CJEU stated that '(…) an international agreement with third countries may confer new judicial powers on the Court provided that in so doing it does not change the essential character of the function of the Court as conceived in the [EU Treaties].'[1088]

The CJEU ended by approving that

'(…) an international agreement may affect its own powers that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the [EU] legal order.'[1089]

For these reasons, it can be concluded that the CJEU did not, in Opinion 1/09, make it impossible for dispute settlement mechanisms, such as investor-state arbitration in the future; however, only to the extent that the autonomy of the EU legal order will be maintained.[1090] In more precise terms, in order not to set aside the autonomy of the EU legal order, it would be more likely that the CJEU would not accept that such investment tribunal would apply and interpret EU law,[1091] if however these tribunal cannot be considered to be 'courts or tribunals of a Member State' within the meaning of Article 267 TFEU.[1092]

In order for the autonomy not to be neglected means that the principle of autonomy cannot be neglected in the sense that an international court or tribunal would circumvent 'judicial dialogue' between domestic courts and the CJEU.[1093]

[1086] Opinion 1/09, Opinion Establishing European Patent Court (n 448), para. 80.

[1087] Ibid, para. 74.

[1088] Ibid, para. 75.

[1089] Ibid, para. 76.

[1090] Baratta, 'National Courts as Guardians and Ordinary Courts of EU Law: Opinion 1/09 of the ECJ ' (n 928), pp. 297-320. Barrata proposes that the Opinion 1/09 lead to the possibility to include investor-State arbitration clauses in EU IIAs.

[1091] Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775), p. 564.

[1092] Judgment of the Court of Justice of 23 March 1982, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, C-102/81, ECLI:EU:C:1982:107, paras. 9-13; Judgment of the Court of Justice of 27 January 2005, *Guy Denuit and Betty Cordenier v Transorient - Mosaïque Voyages et Culture SA*, C-125/04, ECLI:EU:C:2005:69, paras. 12-17. These cases particularly shows that the CJEU has consistently ruled that arbitral tribunals are not 'courts or tribunals of a Member State' within the meaning of Article 267 TFEU.

[1093] Opinion 1/09, Opinion Establishing European Patent Court (n 448), para. 85.

Furthermore, the CJEU does not suggest that international courts or tribunals should transfer the jurisdiction to review EU law, particularly not in areas where the legal review concerns exclusive EU's competences. Instead, the CJEU declared in Opinion 2/13 that even when a court would declare an incompatibility of EU law with international standards, it would raise issues in relation to the EU autonomy. The relevance of the EU autonomy provision is extremely important, specifically in regard to the compatibility of the ISDS provisions in the EU's investment agreements with the EU Treaties. This is because the investor-state tribunal would mainly determine the compatibility of EU's legal acts with international standards of investment protection. The activities of investment tribunals can be more easily compared to international judicial review, than to private arbitration, because of the nature of investor-state arbitration. The nature or power which reflects the investor-state arbitration is mainly some kind of sovereign power, rather than private commercial capacity of the parties. Consequently, when a tribunal investigates ISDS provisions, it would affect the essential characteristics conferred upon the CJEU.

To provide a more practical example, an investor-state tribunal could decide that the reclamation for state aid granted by a Member State would violate standard rules stated in the NGFTA, and thereafter, award damages to the State.

By first glance, it seems as if the EU autonomy would not be threatened since the example is amounting to a '(…) selective non-application of EU State aid law'.[1094] However, the CJEU would still consider the autonomy of the EU legal order threatened, because an international dispute settlement body would have interpreted non-EU law, which in turn has a spillover effect on the autonomy of EU law,[1095] such as in the case of *Micula v. Romania*.[1096] In this case, the arbitral award had condemned Romania to compensate two Swedish investors, the Micula brothers.[1097] The award instituted that Romania had infringed a bilateral investment treaty between Romania and Sweden by revoking an investment incentive scheme in 2005, four years prior to its scheduled expiry.[1098]

[1094] Hindelang, 'The Autonomy of the European Legal Order' (n 916), p. 194.

[1095] Schill, 'Luxembourg Limits: Conditions For Investor-State Dispute Settlement Under Future EU Investment Agreements' (n 944), p. 46.

[1096] T-646/14, Micula and Others (n 1079).

[1097] ICSID 11 December 2013, 'Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No ARB/05/20s.

[1098] European Commission 'State Aid: Commission Orders Romania to Recover Incompatible State Aid Granted in Compensation for Abolished Investment Aid Scheme' 2015 <http://europa.eu/rapid/press-release_IP-15-4725_en.htm> accessed 17 May 2018.

2.4.2 ICS not Addressing Constitutional EU-Law Requirement

An investment court system, such as the one proposed in the NGFTAs, has failed to effectively address constitutional requirements under EU law. The investment courts, such as in the CETA and EUVFTA, seem to have the essential task on assessing EU law, which would clearly contradict the EU's principle of autonomy. Furthermore, as a procedural prerequisite for the consistency of international dispute settlement mechanism with the EU treaties, there is a need for the CJEU to be initially involved in relation to questions concerning the interpretation of EU law.

The threshold for an international investment agreement to be found compatible with EU law is quite high, as Opinion 1/09 and Opinion 2/13 clearly show. The CJEU can solely rule on the interpretation and application of the Treaties; and it is the only authority that can review the legality of the acts of the EU's institutions. Through claiming such exclusive jurisdiction, the CJEU also automatically confirmed the autonomy, and the need for its uniform application. The principles of autonomy represent the very foundation of the EU legal order, providing in this way, the limitation between international law and its EU counterpart. This exclusive jurisdiction can be as established through Article 344 TFEU and Article 19 TEU. The ICS could also provide issues in relation to the function of the EU's internal market, more specifically, in relation to issues of discrimination.[1099]

In a more elaborated example, in relation to the CETA, Canadian investors could bring a claim on behalf of their EU's incorporated companies. Such a company would, in this regard, be Canadian-owned Danish firm that could have more privilege over of a Spanish company which operates in Denmark. In this case, the Canadian owned Danish company would have the possibility to an alternative form of disputes settlement, and such option would not be available for the Spanish company.

Even though one might consider some kind of exaggeration in relation to the potential spillover effects,[1100] or even limited spillover effects,[1101] the majority continues to emphasize that there is a great risk of incompatibility with the principle of autonomy.

This would clearly be the case if the court or tribunal was to interpret EU law in a manner, which would be binding upon the EU institutions.[1102] Nevertheless, this would not be the case if the court or tribunal solely interprets the NGFTA. However, there could remain a risk, and

[1099] Articles 45, 54 and 56 TFEU.

[1100] Herrmann, 'The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy' (n 739), p. 582.

[1101] Schill, 'Luxembourg Limits: Conditions For Investor-State Dispute Settlement Under Future EU Investment Agreements' (n 944), p. 50.

[1102] European Commissioner for Trade 'Concept Paper, Investment in TTIP and Beyond – the Path for Reform. Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court' (n 772), p. 10.

therefore, there is a need to examine whether a court or tribunal could potentially be put in a position to interpret and apply EU law through interpreting certain obligations under the NGFTA which somehow involve EU law issues.

2.4.3 ICS in Relation to Constitutional Principles and Fundamental Rights

The European Economic and Social Committee stated that there are

> (…) considerable EU treaty-related and constitutional law concerns regarding the relations of ISDS ruling with the EU legal order. Private arbitration courts have the capacity to make rulings which do not comply with EU law or infringe the CFR [Charter of Fundamental Rights]. For this reason, the EESC considers that it is absolutely vital for compliance of ISDS with EU law to be checked by the CJEU in a formal procedure for requesting an opinion, before the competent institutions reach a decision and before the provisional entry into force of any IIAs, negotiated by the EC.[1103]

It is important that international agreements concluded by the EU respect the constitutional principles of the EU, such as the foundational values referred to in Article 2 TEU. Article 9 TEU provides that the EU shall observe '(…) equality of citizens, who shall receive equal attention from its institutions', and Article 18 TFEU prohibits discrimination on the grounds of nationality.

The general principle of equality is a fundamental principle of EU law and '(…) requires that similar situations shall not be treated differently unless differentiation is objectively justified.'[1104] What the CJEU has pointed out is necessary to be respected by the EU when concluding international agreements.[1105]

Fundamental rights are part of the EU's fundamental principles. Article 20 of the Charter of Fundamental Rights declares that '[e]veryone is equal before the law'. The principle of non-discrimination in Article 21 of the Charter of Fundamental Rights also needs to be considered when the EU concludes an international agreement.

The question that could be raised between fundamental principles and the investment protection mechanism applied in the CETA, would be regarding the equality before the law, and the principle of non-discrimination. This would be relevant since only persons who form party to the agreement can submit a claim against the other party. Such legal remedy is not

[1103] Official Journal of the European Union, 'Opinion of the European Economic and Social Committee on investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries ' (2015) C 332/06 , para. 1.17.

[1104] Judgment of the Court of Justice of 19 October 1977, *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen ; Diamalt AG v Hauptzollamt Itzehoe*, C-117/76 and C-16/77, ECLI:EU:C:1977:160, para. 7.

[1105] Judgment of the Court of Justice of 10 March 1998, *Federal Republic of Germany v Council of the European Union*, C-122/95, ECLI:EU:C:1998:94, paras. 59-72.

available to domestic investors, or investors from other Member States, but only to foreign, third country investors who are part to the agreement.

The principle of equal treatment provides that differing situations must not be treated in the same manner, unless such treatment is objectively justified. This means that not every situation would be treated in the same way, but each situation which can be considered comparable needs to be treated the same.[1106]

In regard to the treatment between foreign and domestic investors, it should be recalled that the CETA provides that Canadian investors would be granted specific rights in the EU, while this would be reciprocally ensured as well in Canada, where European investors would be granted specific rights. As in any trade agreement, the CETA would have specific rights granted to persons of the other party.

A foreign investor cannot be considered the same as a domestic investor in the sense that the positions of foreign investors as well as the conditions, which they are confronted with, are different in regard to a domestic investor. This is because investors that are investing in a foreign market may face more obstacles in the sense that the conditions for investing may be less adapted to foreign investors than to their domestic counterparts.

Moreover, the treatment that a foreign investor might receive in the other countries where they are investing, concerning political, administrative or judicial authorities may be biased. This simply leads us to the conclusion that investors of one trading party may naturally be resistant to take the risk of investing in another country, because of the differences and obstacles they may face.

An international agreement is there to promote mutual investments between the parties to a trade agreement, and at the same time, averse the potential risk of investing in a foreign market, which in turn would ensure legal certainty, and in this way also raise investment flows between the parties. In other words, the investment protection mechanism available only to foreign entities, such as the one in the CETA, can in fact be justified by the nature of the trade agreement. The conclusion can therefore be taken that foreign investors would be compatible with the constitutional principles of the EU, and the fundamental rights guaranteed by the Charter.

2.5 Balance between the right of investors and host states' right to regulate

If the investors would be able to invoke the NGFTA's protection standards against the national domestic measures, these provisions come together with direct effect, it would lead to

[1106] Judgment of the Court of Justice of 4 May 2016, *Pillbox 38 Limited, trading as Totally Wicked v Secretary of State for Health*, C-477/14, ECLI:EU:C:2016:324, para. 35.

a larger chance of invoking investment arbitration domestically, although invoking domestically might also mean that judges are not very familiar with international investment law. In this regard, the domestic courts are conditioned on the CJEU and the preliminary ruling procedure would be a possibility and the protection for investors is enforced since the investors have the chance to invoke their rights before domestic courts. On the other hand, the issue of competent judges to interpret standards will be a question, which remains unanswered.

These types of concerns actually led to suspending the negotiation on investment protection and the ISDS chapter.[1107] The attempt by the TTIP's negotiation seemed to also safeguard the Member States right to regulate and to limit the scope of investors' rights in the reformed ISDS mechanism,[1108] as was moreover proposed in the EU's concept paper, entitled 'Investment in TTIP and beyond, the path for reform'.[1109]

However, it has been considered that the reform has gone too far in the attempt to try to secure an adequate balance between the right of foreign investors and the right of Member States to regulate in their way to ensure the establishment of a legitimate and transparent ISDS mechanism.[1110]

2.6 Judicial Function Reserved to the CJEU

The judicial function of investor-state tribunal should be reserved to the CJEU, and not made available to EU's investors in the internal market. The domestic courts are not involved once investment arbitration has commenced, and procedural frameworks provide for any means of judicial review of investment awards.[1111] Whilst simultaneously guaranteeing uniform interpretation of EU law, it is essentially impossible for the EU to comply with its international legal obligations in the enforcement of investment awards. The fact that domestic courts are excluded from the investment arbitration process aggravates this issue. In Opinion 1/09, the domestic courts assumed responsibilities under Article 267 TFEU in their role as ordinary courts of the EU legal order. In fact, this mechanism of preliminary ruling presents an indirect control of the CJEU over the interpretation and application of EU law. In relation to investment

[1107] European Commission Staff Working Report 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) ' (n 919).

[1108] Marise Cremona, 'Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) 52 Common Market Law Review 351, p. 357.

[1109] European Commission 'Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations' 2015 <europa.eu/rapid/press-release_IP-15-5651_en.htm> accessed 30 August 2017.

[1110] European Commission Staff Working Report 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) ' (n 919) , pp. 3-4.

[1111] Dolzer, Schreuer, *Principles of International Investment Law* (n 773), pp. 300-301, 310.

arbitration, the CJEU has neither direct nor indirect control over the interpretation of EU law that is carried out by investment tribunals in the process of their adjudicative review.[1112]

From Opinion 2/13, one can draw the conclusion that the principle of the prior involvement mechanism for the CJEU has become an independent element of the principle of autonomy.[1113]

2.6.1 The Risk of an Investment Tribunal Interpreting EU Law

The interpretation of EU law by international tribunal, which sit outside any of the Member States has shown to be a new threat to the EU. The International Court of Justice, the European Court of Human Rights,[1114] the World Trade Organization Dispute Settlement Body,[1115] investment treaty tribunals,[1116] and even the ILO's administrative tribunal[1117] are all examples of international judicial bodies that had issues of EU law raised before them.

There is no real possibility for the CJEU to ensure harmony in its decision in relation to EU law, and at the same time there is no principle that would enable a check of its jurisprudence.

The tribunals are not the courts of any Member States, which means that they are not allowed to ask for a preliminary ruling procedure.[1118]

They are not responsible for any individual Member State and cannot therefore be brought into an infringement proceeding by the Commission if they make mistakes in their interpretation.[1119] This means that there is a possibility for systems such as the ICS to wrongly interpret EU law.[1120]

[1112] Burgstaller, 'Investor-State Arbitration in EU International Investment Agreements with Third States' (n 1000), p. 219 Burgstaller suggests a Treaty amendment to accommodate for the consequences of Opinion 1/09, and in this way facilitate a recognition of investment tribunals as 'courts or tribunals of a Member State' in the meaning of Article. 267 TFEU by the CJEU.

[1113] Opinion 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 246.

[1114] C-84/95 Bosphorus (n 428).

[1115] WTO, Appellate Body Report 9 Sept. 1997, WT/DS27 EC – Bananas III, finding provisions of EC Reg. 404/1993, OJ (1993) L47/1.

[1116] AES v. Hungary, Award, ICSID Case No. ARB/07/22, 23 Sept. 2010, Hungary defended a claim that utility tariff reductions violated the fair and equitable treatment standard under the UK–Hungary bilateral investment treaty by asserting that the tariff reductions were required under EU law.

[1117] ILO ILO Judgment 1369 (1994), European Organisation for the Safety of Air Navigation (Eurocontrol).

[1118] Judgment of Court of Justice of 14 June 2011, *Paul Miles and Others v Écoles européennes*, C-196/09, ECLI:EU:C:2011:388; Opinion of Advocate General Sharpston in Judgment of Court of Justice of 16 December 2010, *Paul Miles and Others v Écoles européennes*, C-196/09, ECLI:EU:C:2010:777, para. 84. AG Sharpston means that the European Court of Human Rights and WTO panels cannot make references to the CJEU under Article 267.

[1119] C-459/03, Commission v Ireland (n 625), The closest the Commission has come is in the '*MOX*' arbitration, in which Ireland commenced arbitral proceedings against the UK pursuant to the UN Convention on the Law of the Sea for environmental harm. the Commission applied for an or-der, which the ECJ granted, that by bringing these arbitration proceedings Ireland had violated its obligations to accord the ECJ exclusive jurisdiction in disputes between EU Member States in areas covered by the EU Treaty, of which environmental protection was one. However, the Commission was not attacking the ruling of the arbitral tribunal as such; it was attacking Ireland's decision to bring a claim before it.

[1120] Matthew Parish, 'International Courts and the European Legal Order' (2012) 23 European Journal of International Law 141, p. 143.

2.6.2 Possibility of Preliminary Ruling Mechanism for NGFTAs

However, when discussing the preliminary ruling procedure, it is very important to keep in mind the function of investors' possibility to challenge EU acts, and national acts which may involve EU law. In this regard, the ICS can be further considered as interpreting and giving meaning to EU law.

An important observation is that in order for proceedings in the ICS to take place, the CETA does not require exhaustion of domestic remedies. For this reason, it is possible to delude that the risk of divergent interpretation would be lessen. Similarly, this may lead to that the domestic courts would keep their function of applying EU law.

If an investor submits a claim to the tribunal in the CETA agreement according to Article 8.22,[1121] only the tribunal will adjudicate the dispute, with the exclusion of the courts of the EU's Member States.

2.6.3 Preliminary Ruling Procedure

It is unlikely that investment agreements would include preliminary reference mechanisms. If such mechanisms would be binding in it, it could represent a violation of the principle of autonomy, due to the CJEU's or domestic courts' lack of involvement.[1122] One has to keep in mind that any tribunal has the essential characteristics of powers conferred upon the CJEU under Articles 19 TEU and 267 TFEU. In Opinion 1/91, the CJEU considers the fact that the EU's agreements cannot transfer the power to interpret the allocation of competences to international courts and tribunals.[1123] Nevertheless, for determining the respondent to a dispute before the ECtHR, such assessment is inherent in the attribution of responsibility according to Opinion 2/13.[1124]

Considering the same question in relation to the arbitration tribunals of the BITs, the intra-BIT would provoke issues in relation to the Europeanization with subordination of intra-BIT's arbitral tribunal. AG Wathelet drew a parallel between the international arbitral tribunal, and the Member States' domestic courts and tribunal; meaning that they are equal. He furthermore argues that because they are equal arbitral tribunal, they should as well be granted the possibility

[1121] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Section F, Resolution of investment disputes between investors and states, Procedural and other requirements for the submission of a claim to the Tribunal, Article. 8.22.

[1122] Pietro Ortolani, 'Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance.' (2015) 6 Journal of International Dispute Settlement 118, pp. 125–28; Tietje, Wackernagel, 'Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration' (n 31), pp. 221-23.

[1123] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), paras. 34-36.

[1124] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), paras. 221, 224 and 225.

to request preliminary rulings from the CJEU in relation to EU law.[1125] However, this is not as easy as it may sound, specifically in relation to the definition and conditions of what constitutes a domestic court defined by the CJEU, since such courts are created on the basis of international Treaties, and are supposed to interpret international public law. The Advocate General went further in his argumentation, stating that intra-EU BITs arbitral tribunal should be fully bound by the CJEU's jurisprudence, applying and interpreting relevant EU law, and the part of international law which is an integral part of the EU.

The counter argument is clearly that the entire idea behind dispute settlement disappears if there would be a possibility to make preliminary ruling procedures, since the effectiveness would vanish. Usually, international arbitral tribunal are not formally bound or subordinated to any court or tribunal; however, it is possible that they consider, or even follow the jurisprudence of other international courts and tribunal. This view may be possible since arbitral tribunals have their seat in the EU and are established under UNCITRAL arbitration rules. Nevertheless, the ability to apply this approach on arbitral tribunals established under ICSID rules is questionable. Taking this argument, a step further, in relation to the NGFTAs, which are following a modified version of the ICSID rules, there could be a possible solution.

It is important to consider in this regard that Article 19(1) TEU requires that the Member States provide remedies sufficient to ensure effective legal protection 'in the fields covered by Union law'. The principle of effective judicial protection constitutes a general principle of EU law stemming from the constitutional traditions common to the Member States, enshrined in Articles 6 and 13 of the ECHR, and "reaffirmed" by Article 47 of the EU Charter.

The judicial system has a key stone in the preliminary ruling procedure in Article 267 TFEU, through which the EU secures uniform interpretation of EU law, and ensures consistency and its autonomy.[1126] The arbitral tribunal in Article 8 of the BIT could, through its mechanism for settling disputes between an investor and a Member State, prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.[1127]

In principle, when an international agreement provides for the establishment of a court that is responsible for the interpretation of its provisions and will then be binding on the EU's institutions including the CJEU, it would become incompatible with EU law. The competence of the EU and its capacity to conclude international agreements necessarily entail the power to

[1125] Opinion of Avocate General Wathelet in Judgment of the Court of Justice of 19 September 2017, *Slowakische Republik v Achmea BV*, C-284/16, ECLI:EU:C:2017:699.

[1126] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 176; C-284/16, Achmea (n 930), para. 37.

[1127] C-284/16, Achmea (n 930), para. 56.

submit a Court that is created or designated by such agreements in regard to the interpretation and application of provisions. This provided that the autonomy of the EU and its legal order are respected.[1128]

The main issue in relation to the BIT's tribunal in the *Achmea* case is that the established tribunal, which is not part of the EU's judicial system, was concluded by the Member States, and not by the EU. For this reason, it calls into question not only the principle of mutual trust between the Member States, but also the preservation of the particular nature of the EU law ensured by Article 267 TFEU. Consequently, it is not compatible with the principle of sincere cooperation,[1129] and may have adverse effects on the autonomy of EU law.[1130] In the case of the NGFTAs, the ICS mechanism would be concluded in the course of EU's trade agreements.

In relation to the preliminary ruling procedure in Article 267 TFEU, a problem is directly created between the CJEU and the Member State when an external body starts interpreting and applying EU law.

In the situation of the EU's patent court, the CJEU laid down in Opinion 1/09 that such an external international court outside the EU's institutional framework could be incompatible with the EU treaty, because the CJEU should have the exclusive jurisdiction to hear action brought by individuals, and to interpret and apply EU law.

The type of external court system, as the patent court provided, could deprive the courts of the Member States of their powers to reply, in relation to the interpretation and application of EU law, through preliminary ruling, to questions referred by domestic courts.[1131]

In the first EEA draft agreement, preliminary reference mechanism was included; it was considered that the CJEU's opinion should be advisory rather than binding in nature, which in turn would alter the essential characteristics of a preliminary reference.[1132]

This aspect has become more significant for the CJEU in Opinion 1/09, because of the need to assess the compatibility with the autonomy of the EU legal order.[1133] The preliminary reference plays, in these circumstances, a central and yet independent role. The CJEU considered that the establishment of EPCt would deprive national courts to request preliminary ruling from the CJEU. The reason is that the draft agreement provided for a preliminary ruling

[1128] Ibid, para. 57; 1/91, Opinion on European Economic Area EEA Agreement I (n 447), paras. 40 and 70; Opinion 1/09, Opinion Establishing European Patent Court (n 448), paras. 74 and 76; 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), paras. 182 and 183.

[1129] C-284/16, Achmea (n 930), para. 58.

[1130] Ibid, para. 59.

[1131] Opinion 1/09, Opinion Establishing European Patent Court (n 448), para. 89.

[1132] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), paras. 59, 61-64. Para. 59 acknowledges jurisdiction under an international agreement, and para. 61 declares that it is unacceptable that the nature of its intervention is altered.

[1133] Opinion 1/09, Opinion Establishing European Patent Court (n 448).

mechanism in order for national courts to refer questions directly to the European Patent Court. This would naturally deprive the national court to refer preliminary ruling questions to the CJEU.[1134]

In this regard, having two systems of courts providing preliminary ruling would '(…) alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law'.[1135]

In Opinion 2/13, in relation to the accession agreement of the EU to the ECHT, it was provided that the interpretation of an EU law's provision (including provisions for secondary law) '(…) requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation'. This case was in relation to the context of assessing the procedure of the CJEU cases brought before the Court of Human Rights against the EU. This procedure was done in a more subsidiary nature, where the ECtHR provided more of a control mechanism, and the CJEU would not be allowed to interpret EU's secondary law. For these reasons '(…) most certainly be a breach of the principle le that the Court of Justice has exclusive Jurisdiction over the definitive interpretation of EU law.'

In Opinion 2/13, the accession agreement of the EU to ECHR was rejected.[1136] The CJEU emphasised the importance of the CJEU's involvement. The CJEU rejected the draft agreement because of provisions that allow referring questions concerning the interpretation of EU primary law only. In fact, the prior involvement mechanism must extend to the review of all EU law for its compatibility with the ECHR.[1137] If not, '(…) there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law'.[1138]

In certain circumstances, the international agreement must provide for a preliminary reference mechanism because of '[t]he necessity for the prior involvement of the Court of Justice in a case (…) in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved (…)'.[1139]

Earlier case-law did not include such mechanism to be an element of the principle of autonomy; but it suggested instead to safeguard the essential characteristics of the CJEU under Article 267 TFEU, when the agreement includes a preliminary reference mechanism.

[1134] Ibid, para. 81.

[1135] Ibid, para. 89.

[1136] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), Schill, 'Opinion 2/13 - The End for Dispute Settlement in EU Trade and Investment ' (n 808), p. 379.

[1137] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), paras. 245, 247.

[1138] Ibid. para. 246.

[1139] Ibid, para. 237.

In principle, it is clear that the EU treaties permit state-to-state dispute settlement mechanisms in international agreements. In this regard, the EU courts are not granted the power to hear such disputes.[1140] Hence, the CJEU does not have the power to hear such disputes.

However, the situation is radically different if it concerns claims which involve EU law. The CJEU has the power to resolve such cases though preliminary ruling mechanism in Article 267 TFEU.

2.6.4 Limited Remedies for Foreign Investors

The CJEU has the full and exclusive power to provide interpretations of EU law, and to ensure the uniform interpretation of EU law.[1141] According to Article 267 TFEU, a national court cannot bring the matter before the CJEU to obtain a preliminary ruling if a question of interpretation of EU law would be raised during the proceedings before the tribunal. In order to evaluate whether it is consistent with the principle of autonomy in EU law, it is necessary to take the agreement in question into account. First of all, it should be highlighted that the CETA is a trade agreement between the EU and its Member States on the one part with its own particularities, such as its new creation of investment protection; it is therefore very different from earlier opinions given by the court, such as Opinion 1/09.[1142]

The jurisdiction of the tribunal is in fact limited to consider the claims brought before it in relation to whether there has been a breach of the investment protection standards related to the interpretation or application of the provisions of the CETA's Investment Chapter, according to Article 8.18 CETA.[1143] The tribunal will, furthermore, not have any jurisdiction to rule on the legality of measure under the domestic law of the parties according to Article 8.31.[1144] In practice, it would mean that even if the tribunal would make assessment of the EU law in its rulings, it would not in fact affect the jurisdiction of the CJEU. Primarily, this is because the only effect that could be derived from these circumstances to the EU would be from a financial nature. As an example, this can be a payment of compensation to the investor concerned in an investment protection dispute.

The tribunal may also consider the domestic law of the disputing parties as 'matter of fact' according to Article 8.31.[1145] In such circumstances, it is upon the tribunal to '(…) follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party

[1140] According to the provisions related to the Court of Justice of the EU to be found in part 6, title 1, chapter 1, section 5. TFEU.

[1141] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), paras. 244-248.

[1142] Opinion 1/09, Opinion Establishing European Patent Court (n 443).

[1143] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[1144] Ibid.

[1145] Ibid.

and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party'.[1146]

Subsequently, the tribunal would be obliged to adopt the interpretation given by the CJEU to the proceedings in the tribunal. The CETA investment court would not infringe the exclusive jurisdiction of the CJEU to provide a definite interpretation of EU law and would not therefore present adverse effects in its dispute settlement body, which would be considered as an obstacle to the CJEU in relation to autonomy.[1147] However, the CJEU's earlier discussion on the possibility of the agreement altering the essential character of powers of the EU's institution, should be consider also in these circumstances.[1148] The CJEU meant that since the EEA agreement applied bot the EU law and that of the agreement, it would lead to the consequences that the EFTAct would interpret also EU law when interpreting the provisions of the agreements. The CJEU also mean that such procedure would also bind the EU and its institutions in their exercise of powers.[1149] Certain modification which clarified the task of the EFTAct to only interpret the EEA agreement in respect to the EFTA countries. Opinion 1/92, clarified that these modifications was considered compatible to EU law.[1150]

The investment protection system in the CETA provides that the EU's measures would be found to be contrary to investment protection principles through which private parties could claim compensation. Because the interpretation of the specific provisions of the CETA's Investment Chapter cannot in fact bind the CJEU courts in their interpretation of provisions of EU law, it would lead to that such mechanism would not contravene the principles established in Opinion 1/91 and Opinion 1/92.

The fact that it is the private parties that may bring a claim before the CETA's international external court system cannot be considered incompatible to the EU case law, as established in Opinion 2/13 concerning the accession of the EU to the ECHR, and Opinion 1/09 concerning the creation of the EU Patent Court. For this reason, the CETA's investment court system cannot be considered incompatible to the principle of autonomy of the EU legal order.

2.6.5 The compatibility of ISDS mechanism

Article 344 TFEU can be considered as a manifestation of the principle of autonomy, in the sense that the rule is designed as to protect and preserve the integrity and the unity of EU

[1146] Ibid, Article 8.31.

[1147] European Parliament Legal Service 'Legal Opinion: Compatibility with the Treaties of Investment Dispute Settlement Provisions in EU Trade Agreements' (n 976), para. 50.

[1148] Opinion 1/09, Opinion Establishing European Patent Court (n 448).

[1149] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), para. 41;1/00, Opinion Establishing a European Common Aviation Area (n 785), para. 13.

[1150] 1/92, Opinion on European Economic Area EEA Agreement II (n 963).

law. A second manifestation is the CJEU's judicial monopoly since it safeguards the right application of EU law. However, the principle is equal to these manifestations but even in cases where the CJEU would not explicitly invoke autonomy, it remains as an underlying force which can still be motivating the decision of the CJEU.

Examining the ISDS mechanism and whether it is compatible to EU law, it is necessary to discuss this in relation to the EU's autonomy.

The CJEU's reasoning is necessary to consider in order to understand the external dimension of Article 344 TFEU. Article 344 TFEU usually concerns cases between Member States. It reads: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.' It means that the Member States have agreed not to submit disputes, which relate to EU law to dispute mechanisms, in order to preserve and protect the integrity and unity of the EU law. It is important to protect the Courts judicial monopoly, even in situations where the Court does not directly invoke autonomy, the underlying principle helps to explain the Court's reasoning, but also the approach that the CJEU takes when receiving international law in the EU legal order.[1151]

In trade and investment agreement, different types of agreements establish certain rights and obligations *vis-à-vis* third countries. In this regard, Article 344 TFEU cannot be limited by a strict reading to apply only to intra-EU relations. Article 344 TFEU restricts Member States from engaging in disputes before other judicial bodies than the CJEU, where the subject matter of the dispute falls within EU competence; especially where the dispute is '(…) between two Member States in regard to an alleged failure to comply with Community-law obligations'.[1152]

Similarly, state-to-state disputes between Member States and third countries can also concern material aspects of Treaty interpretation, which would trigger an application of Article 344 TFEU.[1153] The *MOX Plant* and Opinion 2/13 primarily developed the application in the context of principle of autonomy. In the case of *MOX Plant,*[1154] the Arbitral Tribunal in question, UNCLOS, stayed the proceedings and ordered the parties to inquire whether the CJEU had jurisdiction, because of their involvement of EURATOM and EU environmental legislation.[1155] By virtue of Article 344 TFEU, the CJEU concluded that Member States are

[1151] Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (n 36), p. 3.

[1152] C-459/03, Commission v Ireland (n 625), para. 128.

[1153] Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775), p. 562.

[1154] C-459/03, Commission v Ireland (n 625), In this case Ireland initiated arbitral proceedings against the United Kingdom under the United Nations Convention on the Law of the Sea (UNCLOS) against the operation of a nuclear facility reprocessing spend plutonium in the MOX Plant.

[1155] Nikolaos Lavranos, 'MOX Plant Dispute - Court of Justice of the European Communities: Freedom of Member States to Bring Disputes before another Court or Tribunal: Ireland Condemned for Bringing the MOX Plant Dispute before an Arbitral

prevented from initiating disputes before courts and tribunals other than the CJEU in matters covered exclusively by the EU's competence.[1156] In this regard, Ireland was in breach of its obligations under the Treaty by referring the dispute to the UNCLOS tribunal. In this regard, it concerns mixed agreements, which structurally would allow for the intuition of dispute settlement procedure between Member States.[1157] Opinion 2/13 restricts the CJEU reasoning in *MOX Plant*, and it means that the intra-EU application of Article 344 TFEU would be concerned. Article 344 TFEU would thereby function as an expression of the principle of loyalty,[1158] a protection for the autonomy, but would, at the same time, represent an obligation to facilitate the CJEU in its exercise of its competences.[1159]

However, the CJEU excludes the possibility that Article 344 TFEU should be able to modify, in any way, the very foundations of the EU legal order as was mentioned in Opinion 1/91 *MOX Plant*,[1160] and *Kadi*.[1161] The CJEU moreover emphasised a strong protection of fundamental rights, investigating the EU's internal legislation on fundamental principles of EU law.[1162]

However, opting for a very strict interpretation would lead to limit the EU in its external action. Article 344 TFEU cannot necessarily be considered as limiting the NGFTAs from inserting such a dispute settlement mechanism. The compatibility of ISDS proceedings should be considered in relation to the EU's institutions and bodies. The question of compatibility was put forward in the legal opinion of the European parliament.[1163]

The CJEU's interpretation of the principle of autonomy of the CJEU in Opinion 1/09, does not leave much space for an ISDS mechanism. In the CETA and EUSFTA, the ISDS is put to only apply the agreement and other rules and principles of international law applicable between the parties to the agreements. In this way, it would exclude domestic law; both, the EU law and Member States domestic law.[1164]

Tribunal. Grand Chamber Decision of 30 May 2006, Case C-459/03, Commission v. Ireland' (2006) 2 European Constitutional Law Review 456, p. 461.

[1156] C-459/03, Commission v Ireland (n 625), paras. 126-127.

[1157] Stian Øby Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences' (2015) 16 German Law Journal 169, p. 169.

[1158] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 202.

[1159] Eleftheria Neframi, 'The Duty of Loyalty: Rethinking its Scope Through its Application in the Field of EU External Relations.' (2010) 47 Common Market Law Review 323.

[1160] C-459/03, Commission v Ireland (n 625).

[1161] Joined Cases C-402/05 P and C-415/05 P, Kadi (n 427).

[1162] Opinion of Advocate General Poiares Maduro in Judgment of the Court of Justice of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:11, para. 16.

[1163] European Parliament Legal Service 'Legal Opinion: Compatibility with the Treaties of Investment Dispute Settlement Provisions in EU Trade Agreements' (n 976).

[1164] European Commissioner for Trade 'Concept Paper, Investment in TTIP and Beyond – the Path for Reform. Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court' (n 772), p. 10.

As provided in the TTIP:

> (…) for greater certainty, (…) the domestic law of the Parties shall not be part of the applicable law. Where the tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party.[1165]

As this provision clarifies, it is up to the contracting parties to make the interpretation of their domestic law, and that only such interpretation will be considered in the tribunal. However, it should be excluded that there may be an adverse spillover effects to a decision made from an investor-state tribunal.[1166] In other words it would not be the conferral jurisdiction on a court or a tribunal in itself that would cause the issue with autonomy but rather the potential 'spillover effects' that a decision by such court or tribunal would later generate.[1167]

3 Intermediate Conclusion

The CJEU has developed certain conditions in relation to the EU autonomy in Opinion 1/91 on the imminent conclusion of the EEA Agreement; it was further elaborated in Opinion 1/00 on the Common Aviation Area, and in Opinion 1/09 on the establishment of a European Patent Court.[1168] These cases have shown that as long as a dispute settlement mechanism does not give binding interpretation of EU rules, decide on the delimitation of competences between the EU and its Member States, and alter the institutional regime, it is considered to be compatible with the treaties.[1169] The CJEU has developed certain conditions in relation to the EU autonomy in Opinion 1/91 on the imminent conclusion of the EEA Agreement; it was further elaborated in Opinion 1/00 on the Common Aviation Area, and in Opinion 1/09 on the establishment of a European Patent Court.[1170] These cases have shown that as long as a dispute settlement mechanism does not give binding interpretation of EU rules, decide on the

[1165] European Commission Textual Proposal Customs and Trade Facilitation, EU-US TTIP Negotiations (n 795), Article 13(3) entitled 'Applicable law and rules of interpretation'.

[1166] Uwera, 'Investor-State Dispute Settlement (ISDS) in Future EU Investment-Related Agreements: Is the Autonomy of the EU Legal Order an Obstacle?' (n 1051), p. 133.

[1167] Hindelang, 'The Autonomy of the European Legal Order' (n 916), p. 190 Hindelang, 'Repellent Forces: The CJEU and Investor-State Dispute Settlement' (n 1023), p. 73.

[1168] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), 1/00, Opinion Establishing a European Common Aviation Area (n 785); Opinion 1/09, Opinion Establishing European Patent Court (n 448).

[1169] Angelos Dimopoulos, 'The Compatibility of Future EU Investment Agreements with EU Law' (2012) 39 Legal Issues of Economic Integration 447, pp. 447-472.

[1170] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), 1/00, Opinion Establishing a European Common Aviation Area (n 785); Opinion 1/09, Opinion Establishing European Patent Court (n 448).

delimitation of competences between the EU and its Member States, and alter the institutional regime, it is considered to be compatible with the treaties.[1171]

The EU's constitutional framework is based on the principle of autonomy of the EU legal order. There is a requirement for the EU to respect international obligations, including those arising from concluded international agreements, such as NGFTAs. This chapter is dedicated to a thorough examination of the investor protection solutions provided in the NGFTAs, i.e., the dispute settlement mechanisms and their compatibility with EU law. The difficulty arises from the operation of dispute resolutions, because of its parallel proceedings to the EU legal and judicial system.

The CJEU needs to contain their competence and remain '(…) competent to determine – de iure and de facto – the legality of the acts of EU institutions under EU law as required in Opinion 1/00'.[1172] The balance discussed between autonomy and the disputes settlement mechanism is important to consider. As clarified the ISDS mechanism may have a spill-over effects on EU law. It is a fine balance to consider because the possibility to overcome such could result in limiting remedies to foreign investors which would lead to their protection being undermined. Moreover, finding a narrow interpretation to the principle of Autonomy may result in limiting the EU's external relations with third countries in relation to trade.

The option of having a system, which provides for ISDS but not for direct effect, is neither optimal for investors nor for the civil society. However, it seems to be the option that is generally preferred and applied in NGFTAs. In these agreements, the ISDS is possible but individuals may not rely on the awards before domestic courts. Simply put, it means that a foreign investor will be denied the possibility to bring a claim against the EU's or Member State's measure for their incompatibility with the NGFTA before either CJEU or the Member States' domestic courts. Within domestic and EU law provision, the investor could still rely on prohibition of discrimination, expropriation without compensation, etc. However, standards such as FET are difficult to find in domestic legislation.

This discussion evidently leads to the question of effective enforcement of the ISDS awards. If the enforcement of the award is ineffective the provisions would amount to be insignificant, and therefore not necessary to be included in negotiations. For this reason, it is important that the non-direct effect of the ISDS does not end up hampering the enforcement of the awards. The CJEU made clear that decisions of an international body, which concern compatibility of domestic measures with an international agreement and which do not grant the

[1171] Dimopoulos, 'The Compatibility of Future EU Investment Agreements with EU Law' (n 1169), pp. 447-472.

[1172] Schill, 'Luxembourg Limits: Conditions For Investor-State Dispute Settlement Under Future EU Investment Agreements' (n 944), p. 46.

right to privately enforce the award, and consequently such rights will also not be granted to private parties.[1173]

[1173] Judgment of the Court of Justice of 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC, Giorgio Fedon & Figli SpA and Fedon America, Inc. v Council of the European Union and Commission of the European Communities*, C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476, paras 128-129.

CHAPTER VI
CONCLUSION

This chapter binds together the previous parts of the thesis by summarizing the discussions in a conclusion. It addresses the analytical discussions, which have been presented to highlight the significance and implication the NGFTAs can have on the EU's external action and trade. The categorisation used throughout this thesis is to be understood as a way of providing a whole picture for the NGFTAs.

The NGFTAs are new legal instruments that throughout this thesis have been considered from two different perspectives; the competence perspective, and the autonomy perspective in order to determine where exactly to conclude the limits in relation to what can be regarded to fall within the Common Commercial Policy (CCP). The legal system around the NGFTAs makes it necessary to examine the new Investment Court System (ICS), where issues related to investors' protection and EU autonomy play a significant role.

While it is not an established terminology, the term NGFTA can be used to describe agreements that were negotiated after the shift in the EU's trade policy. NGFTAs constitute a collective assembling of agreements, where all have the same objectives, and are concluded in the spirit of the EU's intention to play a leading role in international trade. The EU's ambition for an enlarged bilateral network is clearly shown through the inclusion of direct investment in the CCP. The agreements, where investment is included, can be viewed within the context of various, and at times conflicting, trade and non-trade objectives.

1 The NGFTAs as a New Legal Instrument

The NGFTAs are considered as a new legal instrument due to their novel and ambitious nature. The agreements clearly stand out with its use of international standards in areas that provides a deeper regulatory integration between the parties. However, the agreements are not entirely similar and have different surrounding circumstances. It can be explained through the fact that the NGFTAs are being continuously developed. The EU–Korea FTA, for example is considered to be the first, after the change in policy, and the first agreement towards the development of the NGFTAs. The ICS (Investment Court System), is another example of the consciously developing trade agenda, and was introduced at a later stage, in relation to the CETA agreement.

Consequently, this new model of NGFTAs is introducing a deeper regulatory integration in trade and investment with an encompassing width of the agreements, in both trade and non-trade related issues. However, through the creation, execution, aims, and objectives it can be concluded that each agreement are unique, and should be considered on a case-by case basis.

As legal instruments for the EU's external action, the NGFTAs provide consequences for the EU's condition on the international level. EU law contains specific characteristics that stem from an independent source of law, which is built up through the treaties and primacy over the law of Member States.

The respect for international law and its principles has become of higher importance to the EU[1174] and should not, in its attempt accommodate to international law or undermine the autonomy of its legal order.[1175] It can be considered that the CJEU in a way has promoted itself, in relation to international dispute settlement, as

> '(…) the guardian of the treaties but also as the ultimate gatekeeper, which decides whether and if so, to what extent and under which conditions and limitations, international law may enter the European legal order'.[1176]

It becomes of specific importance to safeguard the autonomy of the EU legal order, particularly in relation to the compatibility of the dispute settlement mechanisms with EU law.[1177]

International courts and tribunals can, in certain circumstances, limit the interpretation of EU law. Preliminary ruling mechanism can provide a solution to this problem. Is it, however, possible for all types of internationally established courts or tribunals? This pragmatic process of trade advancement in the EU's external relations should at the same time maintain the EU's common values, consistency and autonomy.[1178] Concluding trade agreements should not be done at the expense of restricting the EU's own regulatory power and autonomy. It remains undisputed that the agreements are in nature very different; and one can regroup them in different setting.

[1174] Article 3(5) TEU "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

[1175] Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (n 36).

[1176] Nikolaos Lavranos, 'Designing an International Investor-to-State Arbitration System After Opinion 1/09' in Marc Bungenberg and Christoph Herrmann (eds), *European Yearbook of International Economic Law - Special issue: Common Commercial Policy after Lisbon*, vol (Springer 2013), p. 207.

[1177] Govaere, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order' (n 1065), pp. 187-207.

[1178] Taivankhuu Altangerel, 'The Principle of Balance: Balancing Economic, Environmental and Social Factors in International Economic Law' (2004) 1 Manchester Journal of International Economic Law 4, p. 5.

1.1 Competence in Relation to NGFTAs

The EU uses the NGFTAs as tools in order to pursue bilateral commitments with its strategic partners.[1179] The agreements have a very large spectrum of areas, trade and non-trade related area, that are addressed through various provisions in the agreement, and cannot for this reason be considered as homogeneous. When considering the limits in the attributed competence within the wide subject range of the NGFTA, the interpretation of Article 206 TFEU and 207 TFEU could be considered rather a sliding scale than fixed categories.[1180] The chapters in this type of agreements have shown to be more complex and all-encompassing and may therefore create spill-over effect into other areas.

The NGFTAs provide an interaction between the various competences; and it is not a trivial task to establish the limits between what can be considered within exclusive and shared competence, and implied exclusive competence. However, by considering the CJEU's argumentation in the Opinion 2/15 it is possible to envisage the possible areas that fall within the respective EU competences.

The areas that fall within the EU's exclusive competence pursuant to Article 3(1) TFEU, are areas or provisions, which include government procurement, intellectual property rights, competition, foreign direct investment, trade and sustainable development, state-state dispute settlement and the termination of Member State BIT. Moreover, the EU's exclusive competence also include provisions that govern trade in goods, trade and investment in renewable energy generation and also trade in services except for transport service.

In relation to the exclusive nature of the competence in relation to commercial policy, it can clearly be considered that Member States will have less room to enter independently into international agreements which leads to harmonization of technical standards. This may be regarded as a reflection of the changing nature of trade, which is related to removing technical barriers through harmonization, and also traditional aspects of external trade such as customs duties, but to a lesser extent. This also unavoidably reduces the presence of the Member States on the international scene. If it was otherwise, however, there would be a risk that EU's commercial policy '(…) would be destined to become nugatory in the course of time'.[1181]

The CJEU manifested in Opinion 2/15 that the areas which are concerned for the EU's implied competence pursuant to Article 3(2) TFEU are areas in relation to trade in maritime, rail and road transport services commitments on government procurement in the field of

[1179] Marc Bungenberg, 'Going Global? The EU Common Commercial Policy after Lisbon' in Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law* (Springer 2010) (n 124), p. 126.

[1180] Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (n 133), p. 43.

[1181] 1/78, Opinion on International Agreement on Natural Rubber (n 24), para. 44.

transport. The court considered that the EU's implied competence within the NGFTAs pursuant to Article 3(2) TFEU in particular circumstances that 'may affect common rules or alter their scope' should, according to the CJEU in Opinion 2/15 be interpreted in a less strict manner than what the AG Sharpston did. The conclusion of the CJEU clearly led to provide the possibility to conclude the agreement within exclusive competence.

Moreover, areas which would fall within the shared competence between the EU and the Member States, has been considered areas such as non-direct foreign investment, in particular portfolio investment and dispute settlement between investor and states. It was reasoned this way due to the non-direct foreign investment, such as portfolio investment, has no intention to influence the management and control of an undertaking and the regime governing dispute settlement between investors and states, are fields which are not considered to fall within the EU's exclusive competence and the Singapore FTA.

For this reason and in relation to how the agreement was at the time it was concluded, it was considered necessary to conclude it as a mixed agreement. However, the outcome of this case made the EU to split the agreements into two supporting agreement; one part within exclusive competence and the other part to be concluded as a mixed agreement. Opinion 2/15 distinguishes the different competences of the EU and proposes in which circumstances an agreement should be concluded as a mixed agreement. The CJEU stated that the EUSFTA should be concluded as a mixed agreement; this statement gave uncertainty to the rule relating to facultative mixity. However, it was thereafter clarified that the statement was in particularly related to the EUSFTA. This provides some uncertainty since the discretion of the CJEU is not, in this case, based on objective factors. It is therefore clear that it is not quite possible to make an overall comparison between the NGFTAs. It is in fact necessary to consider the agreements on a case-by-case basis. Furthermore, it is not only the question of competence but also the objectives that have shown to have a great impact in these type of trade agreements.

1.2 The Changed Paradigm in EU's Objectives

In Opinion 2/15, it was moreover considered that the close link to the agreement's trade objectives such as the chapter on sustainable development, played a large role and should therefore be considered to be part of the CCP. It clearly shows that the objectives of the EU external trade have a great impact on the interpretation of the CCP. This is contrary to the prior understanding that the nature of the objectives should form more of a guiding indication. It is part of the EU's external objectives, and not just a political ambition to shape the international order according to EU's values. The EU objectives are many, and some scholars have considered them as a 'major innovation' forming the 'spinal column' of EU's external

action.[1182] Others have instead been enormously critical; some considered them to be more of a 'wish list for a better world',[1183] or as a mere 'epidemic proliferation of objectives of the Union';[1184] while others ridicule them as 'redolent of motherhood and apple pie',[1185] or as expressed as the '(…) relentless accumulation of constitutional law'[1186] which has led to '(…) too much confusing and unhelpful constitutional law of foreign relations in the EU'.[1187]

The objective of any agreement has to be consistent with EU's legislation, as well as with those of its Member States. The Common Commercial Policy (CCP) differs from international trade policies. This is due to the specific nature of the EU, as with its own legal system, it represents a separate legal order from the rest of international law. However, the unity of international representation of the EU is merely an expression of the duty of cooperation, which in turn affects the global image of the EU in the international field.

Even though the imprecise scope of Article 207 TFEU was, to an extent, clarified in Opinion 2/15, it had led to further questions in relation to the EU's objectives in Article 21 TEU. However, after Opinion 2/15 was issued, the approach of the EU's policy in Article 21 TEU can be considered to be redefined by the CJEU. In that opinion, the CJEU relied on Article 21 TEU to include sustainable development among the EU's external objectives.[1188] The CJEU concluded that the objective of sustainable development henceforth forms an integral part of the CCP.[1189] This may have significant consequences, since it could be understood that the CJEU is willing to take the catalogue of competences in Article 21 TEU as a binding rather than a guiding instrument. This would apply similarly to Article 3(5) TEU as complementary to and capable of influencing the objective of trade liberalization spelled out in Article 206 TFEU.[1190]

As a result, this could lead to that broader objectives of the EUSFTA could be subsumed under the umbrella of trade policy, without needing to be categorized as ancillary or incidental

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[1182] Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (n 528), p. 161.

[1183] Armin von Bogdandy, 'The European Constitution and the European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe' (2005) 3 International Journal of Constitutional Law 295, p. 315. He speaks in general of what he refers to a 'hodgepodge of objectives'.

[1184] Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016).

[1185] Dashwood, Dougan, Barry, Spaventa, Wyatt, *Wyett and Dashwood's European Union Law* (n 538), p. 903, referring to Article 21(1) TFEU.

[1186] Bruno de Witte, 'Too Much Constitutional Law in the European Union's Foreign Relations' in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008) 10.

[1187] Ibid, p. 12.

[1188] The CJEU also referred to Articles 9 and 11 TFEU (referring to the integration of social protection and environmental protection requirements into all EU policies and activities 'with a view to promoting sustainable development', 2/15, Opinion of Singapore FTA (n 211), paras. 145-146.

[1189] The CJEU also referred to Articles 9 and 11 TFEU (referring to the integration of social protection and environmental protection requirements into all EU policies and activities 'with a view to promoting sustainable development', ibid, para. 147.

[1190] Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017'(n 347), p. 243.

to the predominant purpose.[1191] In this sense, the CCP continuous development that we have seen, is in fact just the beginning of the increasingly encompassing CCP.

Consequently, trade objectives could come to play a large role in the conclusion of an international agreement. The scope of the CCP was somewhat clarified by Opinion 2/15; the EU's exclusive competence in relation to trade in services, commercial aspects of the intellectual property, and also foreign direct investment, has been further defined.

1.3 Finding the Right Balance

A deeper integration is required by the NGFTAs in the sense of accommodating the differences among the various layers of governance at the international, European and national levels. This type of enhanced integration may lead to promoting the EU autonomy. This is because the EU autonomy is there to safeguard the EU's prerogatives. In this regard, it becomes even more important to find an appropriate balance between liberalisation and free trade and safeguarding the EU autonomy.

As this type of agreements are very wide and relatively new, it is important to establish the right balance between where it is possible to protect the foreign investors, but at the same time protect the Member States right to regulate. Since the investment policy should be '(…) guided by the principles and objectives of the Union's external action, including the promotion of the rule of law, human right and sustainable development (…)',[1192] it becomes essential that there is a clear balance between the right of foreign investors and the right of host states to regulate. Hence, there should be investment liberalisation and protection of investors on the one hand, and non-trade goals on the other hand that are set to ensure that the EU and its Member States are not undermined when pursuing public interest objectives; however, this should be accomplished in a manner which reflects the EU's own approach to the international market. For this reason, the NGFTAs need to be designed in a manner, which does not hinder the EU and its Member States to regulate public interest objectives. In doing so, there is first of all, a necessity to distinguish between the external and internal dimensions.

There are arguments in relation to the ISDS provision in the NGFTAs that it would lead to the suffering of the EU's institutions and their decision-making procedures due to lack of democracy, and legitimacy.[1193] The Commission tried to combat this issue, which arose in

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[1191] Ibid.

[1192] European Commission, Communication Towards a Comprehensive European International Investment Policy (n 53), p. 6.

[1193] Owen Jones, 'The TTIP deal hands British sovereignty to multinationals' *The Guardian* (London, 2014) <http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> accessed 20 January 2016; George Monbiot, 'This transatlantic trade deal is a full-frontal assault on democracy' *The Guardian* (London, 4 November, 2013) <http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> accessed 23 April 2016.

relation to the TTIP negotiations, and attempted to increase the public participation through an online public consultation.[1194]

2 The NGFTAs as Mixed Agreements

Even though international agreements are an integral part of the EU legal order,[1195] the EU's involvement is very much limited to surround only the NGFTAs, since the direct effect is excluded from the provisions of these agreements.[1196] This provides a limitation for the CJEU to interpret the agreements, and for this reason, it is not possible to suggest that they are fully integrated into the EU legal order.[1197] The agreements exclude private rights.[1198] The Investors are also excluded from initiating treaty-based claims before domestic courts or the CJEU.

In the EU external action, the established judicial bodies are indispensable elements,[1199] but the powers transferred under the treaty should remain unaltered.[1200] The CJEU should have the sole responsibility to review the legality of EU law by virtue of Article 19 TEU.[1201] However, the question is whether the arbitration court system can, to some extent, be considered to take over the role of assessing the EU legal order. This question is based on earlier experiences, where the investment agreements may take over this type of tasks.[1202]

When classifying mixed agreements, there is a risk of simplifying it because in practice, it is extremely complicated due to the very closely linked exclusive and shared competences which interact in a range of EU's external powers and international agreements.[1203] The CCP, which now covers services and commercial aspects of intellectual property, allows for a more comprehensive approach to trade and investment issues.[1204] The main issue of concluding

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[1194] The public consultation is established in order to give a clear and easy accessible explanation to why provisions on investment protection and the ISDS chapters, based on the CETA agreement, was introduced, and giving the public the possibility to comment. It would further show the extent to which the provisions would address legitimacy, transparency and consistency issues stemming from the ISDS procedures.

[1195] Article 216(2) TFEU.

[1196] Schill, 'Opinion 2/13 - The End for Dispute Settlement in EU Trade and Investment '(n 808), p. 385; Semertzi, 'Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (n 808).

[1197] Schill, 'Opinion 2/13 - The End for Dispute Settlement in EU Trade and Investment '(n 808), p. 385.

[1198] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, chapter 33, Articles 14-15.

[1199] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), para. 40; Opinion 1/09, Opinion Establishing European Patent Court (n 448), para. 74.

[1200] Opinion 1/09, Opinion Establishing European Patent Court (n 448), para. 76; 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 183.

[1201] Herrmann, 'The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy' (n 739), p. 574.

[1202] Lavranos, 'The ECJs Relationship With Other International Courts' (n 807), p. 399. Lavranos remarks that the pre-Bosphorus case law of the ECtHR also reflects a de facto review of EU legal acts vis-à-vis the ECHR.

[1203] Eeckhout, *External relations of the European Union: Legal and Constitutional Foundations* (n 478), p. 191.

[1204] From an institutional perspective Lisbon Treaty also strengthened the role of the European Parliament in relation to trade related matters. The institutional perspectives will be further discussed in Chapter II.

mixed agreements would be the ratification process, which can take considerably long time. There can be a risk that a national parliament objects to the mixed agreement, through referendums. The Member States even have the right to veto or to nullify the agreement during the ratification process. This indicates the Member States' visible position during the negotiation process on the international scene.[1205]

There is a risk, due to the extensive implementation of mixed agreements, that the EU will no longer be considered to have a single diplomatic presence, and therefore, in relation to its trading partners, it may no longer represent a single entity globally.[1206] This can naturally be a real loss for the EU. There is a clear comparison to draw here in relation to the Doha Round. The reason for which this Round reached a standstill was because there were so many issues to reach a common consensus. This is not the case with the EU, but the issues present themselves rather in the stage of ratification, since it is possible for the Member States to block the ratification in mixed agreements.

2.1 Investment as a New Area to EU's Trade Policy

The CJEU considered that exclusive competence should encompass the national treatment and market access for goods, trade remedies, technical barriers to trade, sanitary phytosanitary measures, customs and trade facilitation, non-tariff barriers to trade, and investment in renewable energy generation. Moreover, it also considered services and electronic commerce to be within exclusive competence. Investment provisions in relation to foreign direct investment, government procurement, intellectual property, competition and related matters, trade, sustainable development, and transparency were also considered within the exclusive competence.[1207]

It is clear from Article 207 TFEU that foreign direct investment would fall within the EU's exclusive competence. The question was whether non-direct investment, such as ISDS, would be considered within the EU's exclusive competence as well. The CJEU concluded that the ISDS would fall within shared competence, because it 'removes disputes from the jurisdiction of the courts of the Member States'.[1208]

For this reason, the argument pursuant to Article 3(2) TFEU in relation to the consideration of ISDS and portfolio investment as an implied EU's exclusive competence, as

[1205] Article 218(8) TFEU.

[1206] Wessel, van Vooren, 'The EEAS's Diplomatic Dreams and the Reality of European and International Law' (n 122), p. 1352.

[1207] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[1208] 2/15, Opinion of Singapore FTA (n 211), para. 292.

the Commission stated, would not be possible. This is because one would not consider that the treaty provision on the free movement of capital would be affected by the NGFTAs.[1209]

2.2 Vertical Delimitation of Competence

The Court and the AG Sharpston agreed on that the non-direct investment and ISDS should be within shared competence. The CJEU then concluded that shared competence should apply for transparency, dispute settlement between parties, mediation mechanism, and also institutional, general and final provisions.[1210]

As long as the EU and its Member States retain treaty-making capacity, mixed agreements will remain as an integral part of the EU's legal landscape.[1211] This does not mean that it would be negative for the EU. It may, in fact, be considered a positive advancement since the mixed agreements do not require a clear vertical delimitation of competence between the EU and its Member States. The EU is then placed in a much better position that easily allows it to have more ambitious agreements without endless battles on the competence. As AG Sharpston mentioned, the agreement is a creature of pragmatic forces to solve issues for international agreements in a multileveled legal system.[1212]

The division of competence, even when an agreement is concluded as mixed, becomes important in cases, where there is a question regarding who should be responsible, the EU or its Member States. This is because the third party would understand that the agreement does not fully fall within the competence of the EU, and that the EU only assumes responsibility for obligations that fall within its scope of competence.[1213]

2.3 The Theory of Facultative Mixity Discarded

The proposed distinction made by Rosas between two forms of mixity: obligatory mixity, and facultative mixity. In these situations, the EU has exclusive competence over only one area of an agreement, which would lead to an obligatory mixity, in such case there is no doubt that the agreement should be concluded as a mixed agreement. However, this was not the case in the Opinion 2/15, and the EUSFTA. In situations where the agreement falls within shared competence of the EU and its Member States, there is a political choice as to whom between them should exercise the competence. This indicate that there is be a possibility to conclude the

[1209] Ibid, paras. 229-238.

[1210] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[1211] Heliskoski, *Mixed Agreements as a Technique for Organising the International Relations of the European Community and its Member States* (n 689).

[1212] C-240/09, AG Sharpston in Lesoochranárske zoskupenie (n 313), para. 56.

[1213] C-13/00, AG Mischo in Communities v Ireland (n 717), paras. 29, 30.

agreement within exclusive competence. the EUSFTA falls partly within shared competence and the CJEU stated that since the agreement have a ISDS mechanism it cannot be '(…)established without the Member States' consent',[1214] and furthermore it '(…) cannot be approved by the EU alone'.[1215] This could be viewed as if the CJEU meant that Opinion 2/15 should be conclude as a mixed agreement would be an obligation, since it more or less indicates that the mechanism of facultative mixity would no longer be a choice at least not in the sense of the ISDS mechanism. This statement was clarified in the *OTIF* case since such statement could have had disastrous ramification, if the theory of facultative mixity would have been considered to be abandoned altogether. If this would have been the case it would have great consequence for the EU in relation to its ability to conclude international agreements in the areas of shared competence. The *OTIF* case if was clarified that the argument of the CJEU was in relation to the specific case and could not be considered as a general rule.[1216]

It could therefore here be considered possible that the CJEU has taken the stand by the theory earlier mentioned in relation to the Council, the finalist theory, which is instead to include every measure that would be likely to influence the volume of flow of trade as part of the CCP.[1217]

In the *OTIF* case,[1218] the CJEU relied on Opinion 2/15 to substantiate its reasoning in relation to the exercise of its external competences in a field even though '(…) the Union had taken no internal action, by adopting rules of secondary law, in that field', such as in the case of non-direct foreign investment.[1219] The CJEU further discussed certain effects surrounding facultative mixity, and the effects of Opinion 2/15. In Opinion 2/15, it was clarified that the EU cannot act alone in shared competence in areas of non-foreign direct investment and that this proposition in the previous opinion was solely related to the specific circumstances of the *OTIF* case and could not be considered to have become a general rule.[1220]

[1214] 2/15, Opinion of Singapore FTA (n 211), para. 292.

[1215] Ibid, paras. 244, 282, and 304.

[1216] C-600/14, Germany v Council (n 311), para 68

[1217] Eeckhout, *External relations of the European Union: Legal and Constitutional Foundations* (n 478), p. 19.

[1218] C-600/14, Germany v Council (n 311); This case concerned a German challenge to the validity of a Council Decision that established a position to be adopted on behalf of the EU at a session of the OTIF (Organization for International Carriage by Rail), Revision Committee concerning certain amendments to the Convention Concerning International Carriage by Rail (COTIF). Germany considered that the proposed amendments did not fall under EU competence. Germany consequently argued that the EU lacked competence in the matter and acted in violation of the principle of conferral, the obligation to state reasons, the principle of sincere cooperation, together with the principle of effective judicial protection. The CJEU dismissed the action.

[1219] Ibid, para. 67.

[1220] Ibid, para. 67.

3 Issues in Relation to EU Autonomy

Considering, the findings throughout the research it is possible to deduce the issues in relation to the ICS which may be considered contrary to EU autonomy. It could be the possibility of the ICS to interpret EU law, and enforcement of awards, but also the construction of the ICS itself, in particular the determination of the respondent.

The core task of the investment tribunal is to assess the compatibility of the legal acts in relation to the investment protection standards, established in the investment agreements. It is clear that this mechanism does not replace the application of EU law in domestic or EU court systems. The idea behind an investment tribunal is not to replace domestic or EU courts in regard with their application of EU law. If an international agreement would empower a judicial body other than the CJEU assessing EU law, it would amount to be contrary to the EU autonomy according to Opinion 2/13.[1221]

Considering the ICS established in the CETA, prior discussion surrounding the *Achmea* case is not fully applicable. This is due to the fact that the ICS does not correspond to the elements considered by the CJEU in the *Achmea*. The difference between the ICS and the *Achmea* case is that the ICS cannot be considered to be 'situated within the judicial system of the EU', it can moreover not be considered to give awards that may not be subject to sufficient 'review by a court of a Member State'.

However, while discussing the findings of these three potential areas which may become issues in the reasoning of the CJEU, it is important to first of all keep in mind the simple understanding of the principle of autonomy. This principle is of high importance for the protection of the EU legal order, and similarly to the EUs role that in relation its third party in this type of agreements. It is therefore important to recall that the principle of autonomy developed into a protection of the Court's own judicial prerogatives, regardless of whether such would be on the cost of the EU's objective for further development on the international level.[1222] This is because the CJEU remains restrained in its task to interpret EU's secondary law in the context of EU's agreements. If an investment tribunal engages in a judicial activity, reserved to the CJEU, this could affect the essential characteristics of the power of the principle of autonomy. It could be seen as if the CJEU concentrates on the protection of the EU's integrity instead of autonomy and the protection of its institutional prerogatives.

[1221] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 246.

[1222] Lenk, 'Investment Arbitration under EU Investment Agreements: Is There a Role for an Autonomous EU Legal Order?' (n 30), p. 139.

Safeguarding the allocation of competence has become as included in an umbrella term for the application of the principle of autonomy.[1223] The power of the CJEU to provide interpretations of EU law to questions given by the courts of the Member States is based on the institutional dimension of autonomy[1224] with the implication of the NGFTAs as a new legal instrument for the EU. It is important to also consider these agreements through a broader international legal framework. The way the CJEU has interpreted the principle of autonomy has not left much space for an ISDS mechanism in the NGFTAs.

In relation to the EU's approach to investment protection, the principle of autonomy can cause limitations. The issues in relation to autonomy would be a potential spillover effect that a decision from a court or a tribunal can cause.[1225]

3.1 Interpreting Matters Relating to EU Law

Since the CJEU's task is to review the legality of legal acts of EU's institutions or Member States in the light of international agreements,[1226] if one were to remove disputes from the CJEU and adjudicate them in arbitrational courts, the whole idea of a functional judicial system is lost, and the idea of preliminary ruling procedures is also lost together with it.[1227]

The CJEU is limited to the interpretation of EU law and is not authorized to review ongoing activities in the investment tribunal once the agreement is in force; however, it may review already rendered award from the tribunal. The investment tribunal, on the other hand, is limited to adjudicate disputes which only concern the interpretation and application of investment agreements, and the CJEU is naturally not bound to follow investment awards, where the incompatibility only concerns the agreements. However, the precise wording of the agreement concerning relevant EU law, could amount to the decisive factor in relation to determining whether an arbitrational tribunal would interpret EU law. The function of the investment arbitration should in this sense be to review EU's legal acts as a 'factual' example *vis-à-vis* investment standards that are stipulated in the investment agreement.

The autonomy of the EU legal order could only be preserved by a functional judicial system that is capable to ensure consistent interpretation of EU law.[1228] The arbitration mechanism was considered by the CJEU to interpret EU law, and Article 8 in the *Achmea's*

[1223] Ibid, p. 146.

[1224] Opinion 1/09, Opinion Establishing European Patent Court (n 448), paras. 84 and 89.

[1225] Hindelang, 'The Autonomy of the European Legal Order' (n 916), p. 190 Hindelang, 'Repellent Forces: The CJEU and Investor-State Dispute Settlement' (n 1023), p. 73.

[1226] Eeckhout, *EU External Relations Law* (n 260), p. 292; Herrmann, 'The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy' (n 739), p. 574.

[1227] C-284/16, Achmea (n 930), paras. 50-52.

[1228] Ibid, para. 35.

BIT was incompatible with EU law.[1229] If, however, an arbitral tribunal would have to prevent interpretative decisions of EU law, there would be no concern. This was accomplished in the NGFTAs through excluding the CJEU from being bound by the tribunal's interpretations.[1230] These are fundamental concerns which apply for NGFTAs, which will be shown in the CJEU's pending Opinion 1/17.

The conditions that the CJEU developed in relation to their dispute settlement mechanism and EU autonomy in Opinion 1/91, further developed in Opinion 1/00 and Opinion 1/09,[1231] have functioned as a base to show how dispute settlement mechanism does not give binding interpretation of EU rules, decide on the delimitation of competences between the EU and its Member State, and alter the institutional regime, it is considered to be compatible with the treaties.[1232]

Article 344 TFEU usually concerns cases between Member States, however, the *MOX Plant* and Opinion 2/13 developed the application in the context of the principle of autonomy. In this regard, it concerns mixed agreements, which structurally would allow for the intuition of dispute settlement procedures between Member States.[1233] It has shown that Article 344 TFEU cannot be limited by a strict reading to apply only to intra-EU relations. Article 344 TFEU restricts Member States from engaging in disputes before other judicial bodies than the CJEU, where the subject matter of the dispute falls within CJEU's competence; especially where the dispute is '(…) between two Member States in regard to an alleged failure to comply with Community-law obligations'.[1234]

The CJEU concluded that, by virtue of Article 344 TFEU in regards to matters which are covered by the EU's exclusive competences, the EU Member States are prevented from initiating disputes before courts and tribunal other than CJEU.[1235] In this case the Arbitral Tribunal in question, UNCLOS, stayed the proceedings and ordered the parties to inquire whether the CJEU had jurisdiction, because of their involvement in EURATOM and EU's environmental legislation.[1236] Since Ireland referred the dispute to the UNCLOS tribunal, it was

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[1229] Ibid, paras. 68-72.

[1230] Article 8.31 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part; Section 3, Article 16(2) EU-Vietnam Free Trade Agreement: Agreed text as of January 2016 These provisions are similar.

[1231] 1/91, Opinion on European Economic Area EEA Agreement I (n 447), 1/00, Opinion Establishing a European Common Aviation Area (n 785); Opinion 1/09, Opinion Establishing European Patent Court (n 448).

[1232] Dimopoulos, 'The Compatibility of Future EU Investment Agreements with EU Law' (n 1169), pp. 447-472.

[1233] Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences' (n 1157), p. 169.

[1234] C-459/03, Commission v Ireland (n 625), para. 128.

[1235] Ibid, paras. 126-127.

[1236] Lavranos, 'MOX Plant Dispute - Court of Justice of the European Communities: Freedom of Member States to Bring Disputes before another Court or Tribunal: Ireland Condemned for Bringing the MOX Plant Dispute before an Arbitral Tribunal. Grand Chamber Decision of 30 May 2006, Case C-459/03, Commission v. Ireland' (n 625), p. 461.

in breach of its obligations under the Treaty. For this reason, according to Article 344 TFEU Member States have agreed not to submit disputes, which relate to EU law, to external dispute mechanisms, in order to preserve and protect the integrity and unity of EU law. This provision provides an important function to the Courts judicial monopoly, even in situations where the Court does not directly invoke autonomy. The principle of autonomy could in a way explain the reasoning and the approach the CJEU has taken when being faced to international law within the EU's legal order.[1237] The important question concerns the interpretation of the principle of autonomy. If it were to be interpreted too narrowly it would lead to the EU being incapable to its external relations, in terms of international trade agreements. However, if it were to be interpreted to widely as a principle it could lead to constitutional issues where an external institution would be capable of affecting the EU's international division of competence.

Similarly, state-to-state disputes between a Member State and third countries can also concern material aspects of Treaty interpretation, which would trigger an application of Article 344 TFEU.[1238] Article 2/13 further restricts the CJEU reasoning in *MOX Plant* and means that the intra-EU application of Article 344 TFEU would be concerned.

Article 344 TFEU would thereby function as an expression of the principle of loyalty,[1239] a protection for the autonomy, but would, at the same time, represent an obligation to facilitate the CJEU in its exercise of its competences.[1240]

The relevant question is then not whether an investment tribunal could interpret the NGFTA, but rather if the investment agreement *per se* has issues which fall within the scope of EU law.

As put in Opinion 1/09, the external jurisdiction should not call the CJEU's exclusive task of interpreting, applying and reviewing the legality of acts of the EU.[1241]

Even though, the ISDS mechanism may, as observed, have spillover effects on EU law, the possibility to overcome such issue would be to limit remedies that foreign investors are exposed to. The CJEU needs to contain its competence and remain '(…) competent to determine – de iure and de facto – the legality of the acts of EU institutions under EU law as required in Opinion 1/00'.[1242] The consequence could, however, be that the protection of foreign investors would be undermined.

[1237] Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (n 36), p. 3.

[1238] Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (n 775), p. 562.

[1239] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 202.

[1240] Neframi, 'The Duty of Loyalty: Rethinking its Scope Through its Application in the Field of EU External Relations.' (n 1159).

[1241] Opinion 1/09, Opinion Establishing European Patent Court (n 448).

[1242] Burgstaller, 'Investor-State Arbitration in EU International Investment Agreements with Third States' (n 1000), p. 46.

In order for the CETA not to be considered to interpret or apply EU law, it is established in Article 8.31(1) of the agreement, that the ICS jurisdiction is limited to the interpretation and application of the CETA and would therefore only consider EU law as a matter of fact. The CETA would rather set its own standard and unlike Opinion 2/13 and Opinion 1/91, CETA would not consider EU's primary or secondary law. For this reason, the CETA could not *per se* be considered as incompatible with the principle of autonomy.

In relation to the *Achmea* case, Article 8 of the BIT specifically required the consideration of "(…) the law in force of the contracting parties. It did not refer to the matter as a "matter of fact". Perhaps this is the difference between the *Achmea* and the CETA in relation to the determination of the principle of autonomy.

3.2 Enforcement of Awards

The enforcement of ICS awards is also dependent on the provisions of the underlying agreement to which third parties are not bound.[1243] The enforceability of the ICS awards has been given a lot of attention in the EU's negotiations. As concluded in the final agreements, awards cannot further be subject to '(…) appeal, review, set aside, annulment or any other remedy'.[1244]

It is in fact the enforcement system that is the crucial advantage of the ICSID arbitration. In ICSID arbitration, the awards are binding and compel the parties to '(…) abide by and comply with the terms of the award'.[1245] In EUVFTA, it is provided according to Article 31(2) that each party shall recognize an award and enforce it as a final judgment of a court in its state. The ICSID convention provides the same rules in Article 53, where an award cannot be overturned by domestic court decision. The EUSFTA and CETA refer directly to the enforcement provisions in the ICSID Convention or the New York Convention. The choice between the two conventions depends on the arbitration rules that are addressed.

The actual composition of the ICS can in fact directly threaten the recognition and enforcement of its decisions in the sense that it can be considered more of a judicial composition than an arbitral composition, which in turn would make it fall outside the scope of the

[1243] Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (n 853), p. 27.

[1244] European Commission Textual proposal to the EU negotiaion of Transatlantic Trade and Investment Parternship (TTIP), section 3, Article 30(1), Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Article 8.28(9)(b). EU-Vietnam Free Trade Agreement, Investment Chapter, Section 3, Article 31(1).

[1245] Article 53(1) ICSID Convention, Regulations and Rules, 'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention'.

convention.[1246] In other words, the issue is whether the national courts in the New York convention contracting States will consider ICS awards as awards made by an arbitral body.

The ICS seems to be an arbitration establishment, but with judicial features. The question is therefore whether the ICS is to be considered as an arbitral body in the sense of the definition in the New York convention. The CETA, TTIP and the EU-Vietnam FTA[1247] states that the offer of consent by a Contracting Party together with its acceptance by an investor through the submission of a claim constituting an 'agreement in writing' for purposes of the New York Convention.[1248]

Another risk in relation to the enforcement is the possibility that the awards rendered by the ICS will interfere with the uniform interpretation of EU law. This is, however, a question that will be further discussed by the CJEU in the pending Opinion 1/17.

3.3 Determination of the Respondent

The requirement of determining a respondent for the ICS proceedings can provide a major issue to EU law and autonomy. An external institution cannot interfere with the division of responsibility of the EU.[1249] The EU is the only party who is recognized with power in the first stage of investor dispute settlement in relation to determining the respondent. This led to avoiding the risk of external interference.

The intermediate step of determining the respondent becomes necessary. On a technical level, the FTAs have taken slightly different approaches to address this issue, but they all lead to the same material result. Under the CETA, a notice requesting the determination of the respondent may be submitted 90 days after the request for consultation and fruitless negotiations of a settlement.[1250] Under the EUVFTA, the claimant may deliver a notice of intent to arbitrate 90 days after the request for consultations, which automatically triggers the determination of the respondent within 60 days of receipt of the notice of intent.[1251]

The EUSFTAs mechanism is quite similar to that of the EUVFTA. The notice of intent to arbitrate triggers an obligation for the EU to determine the respondent within two months.[1252]

[1246] Pantaleo, 'Lights and Shadows of the TTIP Investment Court System' (n 798), pp. 85-87.

[1247] EU-Vietnam Free Trade Agreement: Agreed text as of January 2016

[1248] European Commission Textual proposal to the EU negotiaion of Transatlantic Trade and Investment Parternship (TTIP), Section 3, Article 7(2)(b), The consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of: … Article II of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards for an 'agreement in writing'; Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part Article 8.25(2)(b), EU-Vietnam Free Trade Agreement, Investment Chapter, Article 10(4)(b).

[1249] 2/13, Opinion on Accession to the European Convention for the Protection of Human Rights (n 449), para. 230.

[1250] Article 8.21(1) Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[1251] Articles 6 (1) and (2) EU-Vietnam Free Trade Agreement: Agreed text as of January 2016.

[1252] Article 9.15 (2) EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018).

Allowing the arbitrators to determine the respondent in a particular case would violate the EU's principle of autonomy. However, it is central to underline the importance of Regulation 912/2014 in this regard; and if one were to consider Article 8.21 CETA in relation to this Regulation, it could lead to that it is nearly impossible for an external party to determine the respondent.

The risk of interference in the EU's institutional balance is also important to consider. The possible interference between an investment tribunal and the preservation of the system of vertical allocation of competence seems to be answered by the power the EU has, acting as a respondent in relation to the financial responsibility.

There has been attempts such as in the CETA where in relation to determining the respondent to an investment claim, it is mandatory to send a request to the Commission.[1253] The task of the Commission, within those 50 days, is to take a decision on the respondent which will be binding on the investor-state tribunal.[1254] However, the issues is if the Commission fails to provide a decision within the 50 days, it is up for the investor to identify the responding party. This particular circumstance provides the possibility of the investor to engage in the EU's division of competence and the interference in the EU's institutional balance.

This division of competence in the financial responsibility basically allows to preserve the autonomy of the EU legal order on issues of competence. However, it seems that the division of competence, on its own cannot serve as the key function to preserve the principle of autonomy, it seems that the EU and Member States should together in the spirit of sincere cooperation be collectively responsible for their respecting their obligation under international agreements. This specifically in cases where the agreement does not provide for a specific declaration of competences has been provided.[1255]

This provides a clear clash between the intention of an effective arbitration and the EU's autonomy. Mainly because the provision is intended to safeguard the arbitration process, in order to not suffer and lose the effectiveness because of legal or political struggles on the EU's

The involvement of such nature of investment tribunals in the interpretation of EU law and the legal review of EU legal acts *vis-à-vis* broadly defined treaty standards is likely to violate the essential characteristics conferred upon the Court under Article 19 TEU.'[1256]

[1253] Tietje, Wackernagel, 'Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration' (n 31), p. 239.

[1254] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Ch. 8, Article 8.21.

[1255] C-316/91, Parliament v Council (n 276) , paras 24-34; C-239/03, Commission v France (n 705), paras. 26-30.

[1256] Lenk, 'Investment Arbitration under EU Investment Agreements: Is There a Role for an Autonomous EU Legal Order?' (n 30), p. 159.

Furthermore, the choice on who will be responsible in relation to international disputes between the EU and its Member State has to be regulated by the division of competence in the EU. This is also made clear in the regulation which states that '[i]nternational responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States'.[1257] In other words, the international responsibility is dependent, and has to correspond to the EU's allocation of competence.

4 Possible Modifications of the EU's Approach to NGFTAs

The EU chose a trade policy that includes both trade and investment, instead of a more sector-based approach, where agreements could be concluded separately. Separating an agreement into two parts, investment and trade, could ease the difficulties, as was done in relation to the EU-Singapore agreement post the Opinion 2/15.

4.1 Risks in Concluding the NFTAs as Mixed Agreements

There is risk in relation to the NGFTAs, where the Member States do not ratify the NGFTAs. If one or more national parliaments choose not to ratify a mixed agreement, this can create serious issues. In practice, regarding the NGFTAs that have been provided throughout this thesis, most of the areas covered in these agreements fall within EU's exclusive competence. However, there are still some areas that fall within the shared competence of the EU and its Member States. This necessarily means that the main issues would, at least in the case of the CETA which has been provisionally applied, still be functioning.

The legal issue concerns the case where an agreement is never ratified, and therefore, remains as an incomplete mixed agreement. This can be a result of a Member State's withdrawal from the EU, as well as when a Member State blocks the ratification procedure as was just explained.[1258] In any case, an incomplete mixed agreement may provide severe issues for the EU in its role as a global actor.

4.2 NGFTAs Concluded in Exclusive Competence

Concluding NGFTAs by the EU alone would clearly be easier and more efficient. Particularly, it would be easier in relation to the withdrawal procedure from the EU, but it would also lead to a better image of the EU as a global actor.

[1257] I 'European Parliament and the Council, establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party', para. 3 of the Preamble.

[1258] This terminology is based on based on 'complete incompleteness' which was used by Van Der Loo, Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions null' (n 252).

Most areas fall, in fact, under the exclusive competence of the EU. These areas cover traditional trade related aspects, such as market access for goods, trade remedies, various barriers to trade, and customs and tariffs. Moreover, the EU's exclusive competence also covers services including transport services, public procurement, intellectual property, sustainable development, competition law, and even dispute settlement and transparency. Taking this into account, the Commission could have a very solid argument against the political choice of its Member States to participate in the conclusion and ratification of such trade agreements.

By considering the difficulties that were observed in the CETA, and the ratification issues surrounding it, one could simply draw the conclusion that avoiding mixity could be a better option altogether, specifically when it comes to trade related policy matters.

In a way, it could be possible to argue that this type of trade agreements would undercut the constitutional decision-making procedure of the EU and would in turn delegitimize the European parliament. It would moreover undermine the good standing of the EU in international relations. The increased power of the European parliament contributes to this because of the reaction from the public to agreements such as the ACTA, TTIP, and CETA. To this end, it does not mean that the European Parliament should avoid taking position or averting agreements which are harmful for the EU to conclude, but such action could also defeat the liberalization of free trade, and consequently international relations.

By considering both Opinion 2/15 and the anticipated Opinion 1/17, and despite the *OTIF* case, where facultative mixity was subject to political decision, one could simply draw the conclusion that there is a large possibility that the NGFTAs could be split in the future. This conclusion stems from the fact that most of the provisions in these agreements fall into the EU's exclusive competence, and in case one part of the agreement is separated so that it only includes such provisions, this will allow for more efficient negotiations without being exposed to the risk of blocking the agreement.

What is left under the shared competence is usually only investment protection and parts of the ISDS. This essentially means that it is very possible for the EU to separate the investment protection and conclude a far-reaching agreement as an EU-only agreement. The question is only how important the investment protection and investment dispute resolution would be under such agreements. If these agreements were concluded within exclusive competence the Member States would no longer be required to be involved in the ratification process.

4.3 Separated Investment and Trade Agreements

By removing investment dispute settlement from the negotiation, it could be easier to conclude an agreement. This issue has been quite contested politically and logically; if such was removed, there would not be any issues in relation to the ratification procedure.

The investment chapters have caused a large delay of several years, at least in relation to the CETA, EUVFTA and EUSFTA. Moreover, it led to a large discontent of the EU's Member States and resulted in a problematic situation for the EU's international image.

Negotiating a separate agreement would lead to a simplified ratification and lower the risks to have provisional application of the agreements that will be prolonged. It would create more legal certainty. This is due to the fact that the whole agreement would not be included in the provisional application. If the dispute settlement provisions are included under the provisional application, this may result in complications with potential disputes brought through the agreement's dispute settlement provisions.

The idea of separating trade and investment could further provide easier and faster negotiation, and a higher chance for successfully concluding an agreement. Additionally, it would decrease the chance of reaching a stalled position, such as in the case of the TTIP. Consequently, the EU's reputation as global actor and trustworthy trading partner would be enhanced.

By separating an agreement into two parts, it is the investment part which would be concluded separately in the form of a mixed agreement. The investment protection and ISDS would still fall under shared competence, together with the objective of the agreement. The Member States would need to be part of such agreement which could be done through inserting an 'anchor clause' into the agreement, indicating the necessity for the parties to also negotiate a separate BIT.

From an economic point of view, this approach is very sensible. In terms of negotiating costs, it would simply be too expensive to regulate all domestic instruments that have an impact on international trade, because such instruments may potentially affect the trade between parties. However, it is inefficient to provide for detailed rules on every form of domestic regulation. The reason is that the returns from bargaining over individual instruments are diminishing in the course of negotiations. For instance, while the benefits of negotiating market access may outweigh the associated costs for motor vehicles, this might not be the case for toys.

As a consequence, taking the costs of contracting into account, optimal trade agreements are necessarily endogenously incomplete contracts,[1259] and in contrast to tariffs, it would be too

[1259] Horn, Maggi, Staiger, 'Trade Agreements as Endogenously Incomplete Contracts', p. 395.

costly relative to the gain, and inefficient to bind all domestic instruments *ex ante*. In other words, even if one would decide to bargain over all imaginable domestic measures at the time of negotiations, a solution that is sufficiently flexible to cater for technological or scientific changes would still have to be found. This is the reason why the KOREU provides for so many institutional arrangements, namely, to complete the contract *ex post*. In simple terms, currently less urgent problems should be solved at the point when they become pressing.

5 Concluding Remarks

The NGFTAs, are significant legal instruments for the EU external action which provides the fundamental understanding of the need for a balance between the protection of the autonomous legal order, and the objective of trade liberalization. This is due to the diverse underlying basis of the EUs constitutional framework, i.e., the principle of autonomy of the EU legal order and the EUs requirement to respect its international obligations, including those that are related to international agreements, such as NGFTAs. The NGFTAs are in the core of the EU's objective of economic growth and prosperity for its Member States. For this reason, the balance needs to be maintained in order to ensure that trade liberalization does not restrain the EU autonomy.

Trade liberalisation and regulatory commitments must be conducted through their legal basis. The attribution of competence in the wide subject ranged NGFTAs, was long considered fragmented but was clarified in Opinion 2/15. The CJEU confirmed that the commitments to services of EUSFTA, including transport services, and IPRs fall under the EU exclusive competence. Similarly, commitments on the market access and protection of FDI were also considered to fall within the exclusive competence of the EU.

However, the fact that portfolio investments and the dispute settlement mechanism between investors and states was considered to fall under the shared competence of the Member States and the EU led the Council to announce, according to the Commission's proposal, that future NGFTAs will be split into two parts: One concerning trade, and the other concerning investment.

Moreover, the EU policy objectives establish a more value-based trade policy and may come to play a significant role in future NGFTAs. This was the case in Opinion 2/15 in relation to the commitments on sustainable development, but other objectives may provide similar consequences. It can therefore come to play an important role in future trade agreements and may also affect the practice of EU trade policy making.

The investment policy, in which the EU's institutions, in particular the Parliament, attempt to link foreign investment with development and broader public policy considerations, is shown to have an importance in relation to the ICS established in the CETA. Whether the reformed ICS will affect the EU autonomy is of utmost importance, and the issues that may lead to ICS being contradictory to the EU autonomy are the following.

Firstly, the possibility of the ICS to interpret EU law. Even though the ICS provides the possibility to deal with EU law as a matter of fact, the possibility still remains that the ICS may give meaning to the EU law.

Secondly, the issue of the construction of the ICS which is more of a judicial composition than an arbitral composition makes it fall outside the scope of the convention and could threaten the recognition and enforcement of its decisions.

Thirdly and probably the most likely of all reasons that the ICS would be incompatible to the EU autonomy is the possibility of determining a respondent in the ICS proceedings. The reason is that the procedure provides the possibility for the respondent party to determine the respondent in case the Commission would fail to provide such decision within the 50 days.

It remains to be seen how the CJEU will consider it in its anticipated Opinion 1/17. If the CJEU would, in the unlikely event, consider that the ICS is; its entirety, incompatible with the EU autonomy, would lead to the inability of the EU to conclude an investment protection agreement. However, the more logical outcome would be that the test in *Achmea*, which technically applies both to intra- and extra-EU tribunals, would be considered not to apply to the ICS. This would be due to the fact that the ICS will not be situated within the judicial system of the EU and its awards may not be subject to sufficient review by a court of a Member State. Such an approach would sound sensible considering the ongoing efforts to establish a Multilateral Investment Court System. Consequently, the anticipated Opinion 1/17 will have a decisive impact on the NGFTAs, in regard to their compatibility and design.

Perhaps, the way to find the appropriate balance will be through further emphasizing the duty of sincere cooperation, in particular in relation to the ICS. It is possible to conclude that the division of responsibility between the EU and its Member States seems to be the key to preserve the autonomy of the EU legal order in relation to the issues of competence.

As a final remark, providing a sustainable balance would lead to an external action that runs smoothly and would also benefit the EU's role as an external actor. If the procedure of negotiation of trade and investment becomes too demanding, due to Member States not ratifying agreements or due to changes of circumstance with a Member States withdrawing from the EU, it could become detrimental for the EUs role as a global international actor. Having a cumbersome negotiation may lead to difficulties in further trade negotiations because

the EUs international credibility lies within its achievements. Both the provisional application of the EU-only part of CETA, and also the initiative of splitting the agreements, with one part concerning trade and the other concerning investments, have come to facilitate this process.

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